APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-700

WALTER FLEISHER CO., INC.,

Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

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PETITION FOR CERTIORARI FILED OCTOBER 31, 1979
CERTIORARI GRANTED APRIL 28, 1980

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RELEVANT DOCKET ENTRIES IN THE PROCEEDING BELOW (Chronological List)

	Item	Date
1.	First Amended Complaint for Recovery of Ad Valorem Property Taxes (Los Angeles Superior Court)	Filed June 13, 1977
2.	Answer to First Amended Complaint (Los Angeles Superior Court)	Filed July 15, 1977
3.	Notice of Motion for Summary Judgement, Declarations in Support of Motion, Memorandum of Points and Authorities in Support of Motion (Los Angeles Superior Court)	Filed November 14, 1977
4.	Hearing on Motion for Summary Judgement (Los Angeles Superior Court)	December 27, 1977
5.	Minute Order ruling on Motion for Summary Judgment (Los Angeles Superior Court)	Filed February 3, 1978

6.	Summary Judgment (Los Angeles Superior Court)	Filed and entered March 7, 1978
7.	Notice of Appeal	Filed April 14, 1978
8.	Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four	Filed July 25, 1979
9.	Denial of Petition for Hearing in the California Supreme Court	September 20, 1979
10.	Petition for Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District	Filed October 31, 1979
11.	Petition for Writ of Certiorari granted by U. S. Supreme Court	April 28, 1970

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WALTER FLEISHER COMPANY, INC.,	) NO. C 195 366
Plaintiff,	) FIRST AMENDED COMPLAINT FOR RECOVERY OF AD VALOREM PROPERTY TAXES
vs.	
COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and DOES I through 10, Inclusive,	
Defendants.	

COMES NOW THE PLAINTIFF, AND FOR CAUSE OF ACTION AGAINST THE DEFENDANTS, AND EACH OF THEM, COMPLAINING AND ALLEGES AS FOLLOWS:

1. Plaintiff is, and at all times herein mentioned was, an organized and validly existing corporation.

2. The true names and capacities, whether individual, corporate, associate or otherwise, or

the type of political entity thereof, if any, of the defendants sued herein as DOES o through 10, inclusive, are unknown to the plaintiff, who therefore sues said defendants by such fictitious names, and plaintiff will amend this complaint to show such true names and capacities when plaintiff has ascertained the same or at the time of trial.

3. Defendant County of Los Angeles is, and was at all times herein mentioned, a subdivision of the State of California. Each city named herein as a defendant and DOES 1 through 5, are duly incorporated cities, municipal corporations, and/or political subdivisions of the State of California. The defendant County of Los Angeles collected personal property taxes on behalf of and for the use and benefit of said defendant cities named herein and/or named herein as DOES, and these defendants are named herein along with the County of Los Angeles so that judgment may be entered against all of said defendants, including said city defendants, for refund of the taxes which plaintiff seeks to recover by this suit.

4. On March 1, 1976, plaintiff was the owner of an in possession of a quantity of personal property manufactured or produced outside of the United States and brought into this State for transshipment out of this State, for sale in the ordinary course of trade or business. Such personal property was not in a manufacturing process or production.

5. Under the provisions of California Revenue and Taxation Code Section 225 et seq.,

plaintiff was entitled to an exemption on the personal property referred to in the preceding paragraph, in accordance with said provision and in accordance with Section 225. 1.

6. The assessor of Los Angeles County and the defendants herein have taken the position that Section 225 et seq. of the Revenue and Taxation Code is unconstitutional and/or does not apply to the goods in question, and have denied th this plaintiff and all other taxpayers in the County of Los Angeles any exemption based on the California Free Port Law, Section 225 et seq.

7. Plaintiff was issued each of the tax bill(s) hereafter set forth. Within six months of the filing of the complaint herein, plaintiff, under written protest, paid the whole of said tax to the tax collector of Los Angeles County.

8. The County of Los Angeles and the tax collector thereof, collected taxes on behalf of said defendant cities, and part of the taxes heretofore alleged were collected and were paid to and for the use of said defendants, who received a portion of said taxes.

9. No refund of said tax or any part thereof has been made to the plaintiff or to anyone acting on plaintiff's behalf.

10. Plaintiff filed an Application for Equalization. At the hearing on said application, the Board of Equalization refused to hear any evidence, make any findings of fact, and denied

said application on the grounds that only legal questions were presented and it had no jurisdiction. To the extent that this court finds that the Board should have made factual or legal determinations, plaintiff has been denied due process and equal protection.

11. That said Application for Equalization constituted a claim for refund pursuant to the provisions of Revenue and Taxation Code Section 5141, which claim has been denied within six months from filing this amended complaint.

12. The taxes sought to be recovered herein are on that portion of the tax extended from the assessment of the market value of inventory denied a free port exemption as herein alleged, and as more particularly set forth hereafter, or such greater amount of business inventory as plaintiff proves at trial was entitled to an exemption. The exact amount of such taxes is unknown to plaintiff at this time, and plaintiff will file an amendment to this Complaint, or advise the Court of such amount when it is determined or at the time of trial.

13. Plaintiff was issued the following tax bills. Plaintiff is entitled to an exemption and reduction of market value on each of said tax bills in accordance with Revenue and Taxation Code Section 225 et seq., in the amounts hereafter set forth, or in such greater or lesser amounts as plaintiff may prove at the time of trial, that it is entitled to under the provisions of Section 225 et seq.:

Bill No.	Location	Total	Reduction of Market Value in Inventory
5132022041	1020 E. 14th St. Los Angeles Calif.	$10,325.65	$213,468.95

WHEREFORE, plaintiffs pray for judgment against the defendants and each of them, for all taxes as herein alleged, in the amounts shown to be due at the time of trial, for interest thereon at the rate provided by law, for costs of suit herein; and for such other and further relief as the court deems proper.

BAKER, ANGEL AND EDMONDS

By: _____
GERALD T. MANPEARL
Attorneys for Plaintiffs

(Verification Omitted)

CAPTION OMITTED

ANSWER TO FIRST
AMENDED COMPLAINT

SUPERIOR COURT OF THE
STATE OF CALIFORNIA, FOR THE
COUNTY OF LOS ANGELES

Defendants, COUNTY OF LOS ANGELES and CITY OF LOS ANGELES, by way of answer, deny, admit, and allege as follows:

1. Answering Paragraphs 1, 2, 7, 8, 9, 10, and 12 of the First Amended Complaint herein, defendants do not have information or belief sufficient to enable them to answer the allegations set forth therein and on that basis deny them.

2. Answering Paragraphs 3 of the First Amended Complaint herein, defendants admit the capacities of the named defendants as described. Defendants do not have information or belief sufficient to enable them to answer the remaining allegations of said paragraph and on that basis deny them.

3. Answering Paragraph 4 of the First Amended Complaint herein, defendants admit the ownership of personal property at the time described. Defendants do not have information or belief sufficient to enable them to answer the remaining allegations of said paragraph and on that basis deny them.

4. Answering Paragraphs 5 and 11 of the First Amended Complaint herein, defendants deny the allegations set forth therein.

5. Answering Paragraph 6 of the First Amended Complaint herein, defendants admit

that plaintiff's interpretation of Revenue and Taxation Code Section 225 is unconstitutional and further admit that no importer has yet qualified under an appropriate interpretation of said section. Defendants do not have information or belief sufficient to enable them to answer the remaining allegations of said paragraph and on that basis deny them.

6. Answering Paragraph 13 of the First Amended Complaint herein, defendants deny that plaintiff is entitled to exemption under Section 225. Defendants do not have information or belief sufficient to enable them to answer the remaining allegations of said paragraph and on that basis deny them.

BY WAY OF AFFIRMATIVE DEFENSES THE DEFENDANTS ALLEGE AS FOLLOWS:

7. That plaintiff's First Amended Complaint fails to state a cause of action;

8. That plaintiff has failed to exhaust its administrative remedies;

9. That the Statute of Limitations (Revenue and Taxation Code Section 5138) has expired; and

10. That plaintiff has based its First Amended Complaint on legal theories which have not been embodied in any claim or letter of protest submitted to defendants.

WHEREFORE; defendants pray:

1. That plaintiff take nothing by its First Amended Complaint herein;

2. That defendants be awarded their costs of suit; and

3. That defendants be awarded such other and further relief as the court deems proper.

DATED: JUL 15 1977

JOHN H. LARSON, County Counsel

By _____ ss.
JAMES DEXTER CLARK
Deputy County Counsel

Attorneys for Defendants

(Declaration of Mailing Omitted)

CAPTION OMITTED

NOTICE OF MOTION FOR SUMMARY JUDGMENT (CCP Section 437c)
DECLARATIONS IN SUPPORT OF MOTION
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES

TO THE DEFENDANTS AND THEIR ATTORNEYS OF RECORD

Notice is hereby given that on November 23, 1977, at 9:00 A. M., or as soon thereafter as the matter may be heard, in the courtroom of Department 83, located at 111 North Hill Street, Los Angeles, California, the plaintiff Walter Fleisher Company, Inc., will move the above entitled court for a summary judgment in favor of said plaintiff and against all of said defendants.

Said motion for summary judgment will be made upon the grounds that there is no defense of the complaint herein, that there are no triable issues as to any material facts and that plaintiff is entitled to a judgment as a matter of law.

Said motion will be made and based upon this notice, the declarations attached hereto and filed herewith, the Memorandum of Points and Authorities served and filed herewith, all papers, pleadings and records filed herein, such additional declarations and affidavits that may be filed prior to or at the hearing hereon, such matters that the court may take judicial notice of.

and such other evidence, declarations, affidavits and points and authorities as may be presented or filed with the court prior to or at the hearing hereon.

Dated: Nov 14, 1977.

BAKER, ANCEL AND REDMOND

By: /s/
GERALD T. MANFEARL and
THOMAS C. CORCOVELOS
Attorneys for Plaintiff

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DECLARATION OF WALTER P. FLEISHER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, WALTER P. FLEISHER, hereby declare as follows:

1. Your declarant is the president of Walter Fleisher Company, Inc., and is familiar with all the facts stated herein, and if called upon as a witness could competently testify thereto.

2. Walter Fleisher Company, Inc., is a duly organized and validly existing corporation.

3. Walter Fleisher Company, Inc., is a wholesale importer and a distributor of novelties and gifts selling its products throughout the United States. Walter Fleisher Company, Inc., warehouses the goods described herein awaiting sale, and upon sale such goods are transshipped to locations throughout the United States.

4. For the 1976-77 tax year, lien date March 1, 1976, Walter Fleisher Company, Inc., filed Business Property Statements showing inventory located at one location in Los Angeles County:

A. 1020 East 14th Street, Los Angeles, California--inventory having a market value of $319,660.

5. Of the total market value of inventory listed above, 90%, to wit, $287,694, was imported by Walter Fleisher Company, Inc., from foreign countries. These imported goods will hereafter be referred to collectively as "imported inventories."

6. For the year preceding lien date March 1, 1976, (to wit, 7/1/74--6/30/75) 74.2% of Walter Fleisher Company, Inc.'s total shipments from 1020 East 14th Street, Los Angeles, were to customers located outside of the State of California. 25.8% of such shipments were to customers located inside the State of California.

7. All of the imported inventories of Walter Fleisher Company, Inc., are personal property which is manufactured or produced outside of the United States and brought into California by Walter Fleisher Company, Inc., as the original importer, none of which personal property is in a manufacturing process or production.

8. Under the provisions of Revenue and Taxation Code Sections 225 and 225.1(1), plaintiff is entitled to an exemption or reduction on the market value of its inventory of $213,468.95 (74.2% X $287,694) (All of which is herein referred to as "the inventory which is the subject of this lawsuit")

9. All of the inventory which is the subject of this lawsuit was brought into this state for transshipment out of California in the ordinary course of business, and on tax lien date March 1,

1976, was in plaintiff's warehouse awaiting such shipment.

10. In filing plaintiff's Business Property Statement for 1976 an exemption under Revenue and Taxation Code Section 225 was demanded; however, such request for exemption was denied, and plaintiff was issued the tax bill which is attached hereto as Exhibit "A." Plaintiff paid such tax bill under protest in two installments, accompanied by letters of protest dated December 6, 1976, and March 22, 1977, for each payment, copies of which letters are attached hereto as Exhibit "B."

I declare under penalty of perjury that the foregoing is true and correct.

Executed _____, 1977, at Los Angeles, California.

_____ss
WALTER P. FLEISHER

(Exhibits Omitted)

DECLARATION OF GERALD T. MANPEARL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, GERALD T. MANPEARL, hereby declare as follows:

1. Your declarant is a partner of Baker, Ancel and Redmond, duly licensed California attorneys and the attorneys for the plaintiff Walter Fleisher Company, Inc., herein, and is damiliar with all of the facts stated herein, and if called upon as a witness could competently testify the thereto.

2. Attached hereto as Exhibit "A" is a copy of an Application for Equalization filed with the Los Angeles County Assessment Appeals Board by your declarant. The application was heard on March 18, 1977, at which time your declarant appeared on behalf of the applicant Walter Fleisher Company, Inc., and offered to prove the facts stated in the application, that applicant was entitled to an exemption, and entitled to a reduction in market value, pursuant to the grounds stated in the application. The Assessor's office objected to the offer of proof on the grounds that only a legal question was presented to the Board. The Board, on the grounds that only a legal question was presented, then denied the offer of proof and denied the application.

3. The Application for Equalization stated that it was to constitute a claim for refund, and denial of the application constituted a denial of the claim for refund under the provisions of Revenue and Taxation Code Section 5141.

4. Attached hereto as Exhibit "B" is a copy of a form prepared by the California Franchise Tax Board in connection with obtaining exemptions under Revenue and Taxation Code Section 225 et seq. This form is being sent to importers in connection with filing requests for exemption for the 1977 tax year, however, your declarant has been advised by the Los Angeles County Assessor's office that no exemptions under Section 225 et seq. have been granted in Los Angeles County for 1976 or for 1977, even though importers are being allowed to complete and return the form attached hereto as Exhibit "B."

5. In the event this court grants the motion for summary judgment in favor of the plaintiff, plaintiff will supply the court with the exact amount of refund and interest to which plaintiff would be entitled, based upon a reduction of the market value of plaintiff's inventory. This information can readily be computed from the tax bill and by the amount of interest pursuant to Revenue and Taxation Code Section 5151, or can be readily computed by the County Treasurer's office and submitted to the court by stipulation. This procedure has been used by your declarant and the County Counsel's office on a number of other occasions, both for summary judgment proceedings and trial, involving other lawsuits

for the refund of property taxes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed _____, 1977, at Los Angeles, California.

_____ss
GERALD T. MANPEARL

(Exhibits Omitted)

I

STATEMENT OF FACTS AND BACKGROUND

On lien date March 1, 1976, plaintiff had inventory located in its warehouse in Los Angeles County, and although plaintiff claimed an exemption under California Revenue and Taxation Code Section 225 et seq., an assessment was made on the full value of plaintiff's inventory, and plaintiff was sent a property tax bill. The bill was paid, and the instant suit is for recovery of ad valorem property taxes.[1]

Plaintiff Walter Fleisher Company, Inc., is an importer of novelties and gifts and distributor of such products are sold to California customers.

Until recent years all of plaintiff's goods were exempt from local ad valorem property taxes

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1 This is a case of first impression. Plaintiff knows of no appellate court decisions regarding Section 225 et seq. Only two cases have come before the trial courts, and in both, Motions for Summary Judgment were granted for plaintiff: Zee Toys and Formosa Plastics Group (U.S.A.), Inc., v. County of Los Angeles, L.A. Superior Court No. 179 151; All American Distributing Co., Inc., v. County of Los Angeles, L.A. Superior Court No. C 182 173.

under the Import-Export Clause of the United States Constitution.[2]

In Brown v. Maryland (1827) 25 U.S. (12 Wheat) 419, 6 L. Ed. 689, the United States Supreme Court fromulated the original package deoctrine, holding in substance that goods held by the original importer in their original package were immune from taxes, and in Low v. Austin (1971) 80 U.S. (13 Wall.) 29, 20 L. Ed. 517, the Supreme Court held that such immunity applied to all state and local taxes, whether discriminatory or nondiscriminatory.

Under these cases the plaintiff and similarly situated importers had import immunity for their goods which were in their original package.

In 1972 theCalifornia Supreme Court decided Volkswagen Pacific v. City of Los Angeles (1972) 7 Cal. 3d 48. Although the case involved a city license tax, because of ambiguous languate in the decision, the County of Los Angeles and a number of other major counties, took the position that the "original package" of imported goods was a seagoing cargo van and not the shipping carton itself. Based on this interpretation, a number of counties began denying import immunity to importers that used seagoing cargo containers.

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2 Art. I, §10, Cl. 2: "No state shall, without the consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws."

The implementation of this policy by county assessors occurred at a time when California ports were under tremendous competitive pressure from the Pacific Northwest, including the ports of Tacoma, Seattle and Portland, and California warehousing operations were facing increasingly stiff competition from such major warehousing centers as Reno, Sparks, Las Vegas, and even as far away as Utah. Containerized goods could be easily moved and transported to these inland ports, and the facilites in these areas were growing at a rapid rate, primarily due to losses suffered by California ports and warehouses.

The imposition of property taxes on goods arriving in cargo vans added another competitive disadvantage to importers in California, especially those with natinal or out-of-state distribution facilities. In response to this problem, the California Legislature passed Revenue and Taxation Code Sections 225 et seq., commonly referred to as the California Free Port Law.[3]

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[3] "Section 225. Personal property manufactured or produced (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this states, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not

(cont.)

The Free Port Law was intended to provide immunity for those importers such as the plaintiff, that intended to use California transportation and warehousing facilities for the storage of goods that were ultimately going to be shipped outside the State of California. The Legislature felt that it was necessary to provide an exemption for such importers and distributors that were ultimately

4 (cont.)
include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property.

"Section 225.1. A person claiming an exemption under Section 225 may either claim this exemption by (1) a percentage method of determining property held for transshipment on hand at a particular location by allocating a portion of the total inventory, using the percentage determined by dividing the total out of state shipments by the taxpayer from that location during the preceding year by the total of such shipments from that location during such year, or (2) an actual method as evidenced by contracts of sale on the tax lien date, and a full, true and correct inventory of all property held for transshipment together with the date of receipt of the same, the date of withdrawal of the same, the point of origin thereof, and the point of ultimate destination thereof.

"Section 225.2. Any property exempted under Section 225 which is reconsigned to a final destination in this state shall be subject to escape assessment procedures."

going to ship their goods out of California, but not for such companies that were using their facilities to sell to California customers. With this rationale in mind, the Legislature provided the exemption set forth in Section 225, and provided two alternative methods for computing the exemption, which are set forth in Section 225.1, of the Revenue and Taxation Code.

At the time Section 225 was passed, the controversy over whether containers were or were not in an "original package" under the U.S. Constitution, was still being litigated in the courts. (See, e.g., Singer v. County of Kings (1975) 46 Cal. App. 3d 852, 121 Cal. Rptr. 398; Montgomery Ward v. County of Alameda (N.D. Cal. 1975) 390 F. Supp. 177; Craig Corp. v. County of Los Angeles (1975) 51 Cal. App. 3d 909, 916) The new section, however, provided importers with an additional and independent grounds for claiming exemption from property taxes. The exemption provided is broader than the immunity under the Import-Export Clause, and allows importers, while the goods are in storage, to open the original cartons and repackage, relabel, etc. The 1976 tax year, lien date March 1, 1976, was the first opportunity for importers to claim exemption under the California Free Port Law.

On January 14, 1976, the United States Supreme Court rendered its landmark decision in Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495, overruling Low v. Austin, which had been the law of the land for

over 105 years, holding that nondiscriminatory ad valorem property taxes did not come under the purview of the Import-Export Clause. The Court specifically left open, however, the question, in any individual case, of whether goods would be immune under the Commerce Clause of the United States Constitution, and of course, goods would continue to be exempt under local property tax laws.

It is clear that the exemption provided under Section 225 was not intended to be dependent upon Low v. Austin or the Import-Export Clause. It is an independent exemption statute whose viability continues. The court is referred to an opinion by Legislative Counsel dated 3/21/76, to Senator Milton Marks, the author of Section 225, and to a letter from the State Board of Equalization dated 2/2/76 addressed to county assessors, which documents are attached hereto for the convenience of the court respectively as Exhibits "A" and "B." In both of these opinions the conclusion is reached that after the Michelin decision assessors must still provide exemptions under Section 225 for goods that are stored in the State of California for transshipment, and that meet the necessary criteria of Section 225.

The California State Board of Equalization has prepared a document entitled "Exemption Claim for Goods Held for Transshipment," a copy of which is attached to the Manpearl declaration as Exhibit "B." This exemption claim is being provided to importers throughout California, including importers in the County of Los Angeles.

However, to date, the Los Angeles County Assessor's office has not seen fit to allow one single exemption to any importer in California for either the 1976 or the 1977 tax year. Plaintiff, along with all other importers, has been denied any claim for exemption under Section 225 or any immunity under the Commerce Clause of the United States Constitution.

II

ARGUMENTS PRESENTED

It is submitted that plaintiff is entitled to an exemption on the inventory which is the subject of this lawsuit under Section 225.1(1). Under this section an importer is entitled to claim an exemption on a percentage of his inventory based on his total out-of-state shipments from the location in question compared to the total shipments from such location. The intent of the warehousing operations for goods sold or shipped out of the State, and not to provide an exemption for an importer's California business.

III

PLAINTIFF IS ENTITLTED TO AN EXEPMTION UNDER SECTION 225 ET SEQ.

A. CALIFORNIA CONSTITUTIONAL PROVISIONS

Article XIII, Section 2 of the California Constitution provides in part:

> "The Legislature may provide for property taxation of all forms of tangible personal property, shares of capital stock, evidences of indebtedness, and any legal or equitable interest therein not exempt under any other provision of this article. The Legislature, two-thirds of the membership of each house concurring, may classify such personal property for differential taxation or for exemption." (Emphasis added)

It is common practice for the California Legislature to provide exemptions when the Legislature has, in its discretion, determined that such exemption is in the public interest. (See generally Revenue and Taxation Code Section 201 et seq.) Examples of such exemptions are: property brought into the state for exhibitions at fairs, carnivals, scientific, educational, religious, or artistic works (§213); 50% of all business inventories (§219); aircraft while being repaired

(§220); household furnishings (§224); seagoing cargo containers (§232); motion pictures (§988); wine held for aging (§992); computer programs (§995); and business records (§997).

In discussing the broad power of the Legislature to determine taxing policy, the California Supreme Court stated in Delaney v. Lowery (1944) 25 Cal. 2d 561, 568-569:

> "Generally the Legislature is supreme in the field of taxation, and the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it . . . .
>
> "'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used.' That rule is a corollary of the strong presumption of the constitutionality of an act of the Legislature."

In Stevens v. Watson (1971) 16 Cal. App. 3d 629, 633, the Court stated:

> "The power of this state to select the subjects of taxation or to grant exemptions therefrom is very broad and a legislative determination

in this field must be sustained if there is any conceivable state of facts which would support it."

California's Free Port Legislation, Revenue and Taxation Code Sections 225 et seq., is a properly enacted legislative act, passed pursuant to and in conformity with the legislative power granted in Article XIII of the California Constitution to exempt certain classes of personal property from taxation. One purpose of such legislation is clearly to prevent the abuse of the state's taxing power by exempting properties imported into the state and stored pending shipment out of California. Such purpose is to prevent a burden upon commerce by providing an exemption which is broader than that provided by the Commerce Clause or the Import-Export Clause, and so to encourage commerce in the state, and the use of California facilities. The California Legislature's determination that such property should be exempt from California taxation, as well as the reasonable methods the Legislature devised to compute the exemption, must be sustained. (Atlantic Richfield Co. v. County of Los Angeles (1977) 68 Cal. App. 3d 105, 115).

B. STATUTES ARE TO BE PRESUMED CONSTITUTIONAL.

The genral and undisputed rule of constitutionality is set forth in a recent California Supreme Court decision:

"In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the act." California Housing Finance Agency v. Elliott, 17 Cal. 3d 575, 594 (1976). Accord, Henry's Restaurants of Pomona, Inc. v. State Board of Equalization, 30 Cal. App. 3d 1009, 1016 (1973); 13 Cal. Jur. 30, Constitutional Law, Section 66, at 124 (1974).

As indicated by the above quoted authorities, Revenue and Taxation Code Sections 225 and 225.1, as validly enacted legislative acts, are entitled to a presumption of constitutional validity in the absence of a showing of clear and unquestionable conflict with the state or federal constitutions. California Housing Finance Agency v. Elliott, supra, at 594.

C. TAXING STATUTES ARE TO BE CONSTRUED IN FAVOR OF THE TAXPAYER.

"It is settled law that taxing statutes are acts 'in invitum' and that the courts will not adopt a strained construction to impose a tax which is not part of the legislative act. . . . If the legislative act expresses an intention to exempt certain property judicial construction is not appropriate to defeat the exemption." Estate of Melvin, 10 Cal. App. 3d 48, 55 (1970).

". . . . [A]s a general rule constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will not be enlarged nor extended beyond the plain meaning of the language employed . . . . But the rule of strict construction does not require that the narrowest possible meaning be given to words descriptive of the exemption, for a fair and reasonable interpretation must be made of all laws with due regard for the ordinary meaning of the language employed and the object sought to be accomplished thereby." Honeywell Information Systems, Inc., v. County of Sonoma, 44 Cal. App. 3d 23, 27 (1974).

Sections 225 et seq. are presumed constitutional and valid, and doubts as to the meaning or extent of the exemption are to be resolved in favor of the taxpayer. In this case, the interpretation of the Free Port Law must comport with the California Legislature's intention to exempt from taxation those certain properties held in California awaiting shipment out of the state. Furthermore, even though exemption statutes are to be strictly construed, their interpretation must be consistent with the ordinary meaning of the language employed rather than the narrowest meaning that could be attributed to such language.

D. SECTION 225 PROVIDES AN EXEMPTION TO PROPERTY IN STORAGE AWAITING SHIP-SHIPMENT.

The purpose of the California Free Port Law is clearly to provde an exemption greater in breadth than that provided under the Import-Export Clause (as interpreted prior to Michelin) and greater in breadth than that provided under the Commerce Clause. That the section covers property which is held in storage awaiting shipment out of the state is celar from the language of the statute itself. Section 225 contains the following language:

> "The exemption under this section shall not apply to personal property in manufacturing process or production. That process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property."

This language can only be interpreted to mean property which is not in a continuous transportation process.

As indicated in the declarations, 90% of the inventory of plaintiff is imported from without the United States. It is stored in a warehouse, there to be sold in the ordinary course of business throughout the United States.

As set forth in the declaration in support of the motion for summary judgment, plaintiff

has computed the percentage of its goods which were shipped out of state for the year preceding the March 1, 1976, lien date, as 74.2% of its total shipments. Therefore, under the provisions of Section 225 and 225.1(1), plaintiff is entitled to an exemption on its inventory equaling 74.2% of its total imported inventory on hand March 1, 1976. Plaintiff's total imported inventory on lien date was $287,694.00, and the exemption of 74.2% therefore would amount to an exemption on inventory having a market value of $213,468.95. Plaintiff claims it is entitled to a refund based on such value, and in the event this court agrees and grants a summary judgment, as set forth in the declaration attached hereto, the tax represented by such amount and the interest thereon will be computed and supplied to this court from figures to be obtained from the tax collector's office.

IV

CONCLUSION

It is respectfully submitted that the summary judgment should be granted in favor of the plaintiff and against the defendants.

Respectfully submitted,

BAKER, ANCEL AND REDMOND

By: _____ss
GERALD T. MANPEARL and
THOMAS C. CORCOVELOS
Attorneys for Plaintiff

(Declaration of Mailing Omitted)

CAPTION OMITTED

STIPULATION OF FACTS FOR MOTION FOR SUMMARY JUDGMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES

The parties, by and through their attorneys, stipulate to the following facts, for purposes of plaintiff's Motion for Summary Judgment and for no other purposes:

The goods which are the subject of this Motion for Summary Judgment are manufactured or produced in foreign countries, shipped to the plaintiff, who is the original importer, where they are unloaded into warehouses in the custody and possession of the plaintiff, awaiting sale and delivery to plaintiff's customers who are located throughout the United States. The goods are stored for indefinite periods of time awaiting such sale and delivery.

DATED: December 22, 1977

JOHN H. LARSON, County Counsel

BY: _____ ss
JAMES DEXTER CLARK
Deputy County Counsel
Attorneys for Defendants

BAKER, ANCEL AND REDMOND

BY: _____ ss

Attorneys for Plaintiff

(Declaration of Mailing Omitted)

CAPTION OMITTED

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
DECLARATION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES

INTRODUCTION

The plaintiff and defendants disagree as to the interpretation of §225 of the Revenue and Taxation Code which exempts certain kinds of goods from taxation. There is no dispute as to the constitutionality of the statute, although the defendants claim that one of the reasons for not choosing the plaintiff's version of the statute is that that version will result in constitutional problems. It should be noted that the dispute is not a small one. As the Declaration of James Dexter Clark points out, there are over 30 lawsuites claiming $1,000,000.00 of exempted taxes now filed and served, which represent only a part of the importers now claiming that section.

PLAINTIFF'S CONTENTIONS

1. The plaintiff has argued that Section 225 is a "Free Port" law made in response to competitive pressures, and that the section was designed to reverse the language in Volkswagen Pacific v. City of Los Angeles, 7 Cal. 3d 48, 101 Cal. Rptr. 869, 496 P. 2d 1237 (1972) (see also

Craig v. County of Los Angeles, 51 Cal. App. 3d 909, 124 Cal. Rptr. 621 (1975)). The plaintiff argues that the section was meant to give importers an even broader exemption than that provided them under Low v. Austin, 80 U. S. (13 Wall.) 29, 20 L. Ed. 517 (1871), (recently overruled by the U. S. Supreme Court in Michelin Tire Corp. v. Wages, 423 U. S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976)). The breadth of the plaintiff's interpretation can be seen by the fact that all repackaged goods would not even appear to receive the immunity under Low v. Austin, supra, while they would under plaintiff's version of Section 225. Most of the goods of plaintiff would be taxable pursuant to Craig v. County of Los Angeles, supra.

2. The plaintiff next contends that the "Free Port" interpretation is supported by various administrative documents. (Plaintiff's Motion p. 15.)

3. The plaintiff argues that the Legislature has the power to exempt, and that any doubt that that power exists should be resolved in favor of its existence. (Plaintiff's Motion pp. 19, et seq.)

4. The plaintiff also contends that the Legislature may exempt businesses generally and also may exempt business which import while not exempting businesses dealing in U. S. goods. (Plaintiff's Motion p. 18.)

5. The plaintiff next relies on the pending opinion in Atlantic Richfield Co. v. County of Los Angeles, 68 Cal. App. 3d (advance) 105 (1977) for the proposition that the Legislature's determination that some property should be exempt must be accepted by the court. (Plaintiff's Motion p. 19.)

6. The plaintiff next cites cases supporting the idea that legislative acts are presumed constitutional. (Plaintiff's Motion p. 19.)

7. The plaintiff states that there is a general rule that all taxing statutes are to be construed in favor of the taxpayer. They rely for this proposition on cases which state that an exemption should be interpreted consistently with the legislative intent despite the general rule that "statutes granting exemption from taxation are strictly construed. . . ." (Plaintiff's Motion p. 20.)

8. The plaintiff next relies on language of the statute which makes an exception in the exemption. The exception denies protection to goods destined for manufacture. The "exception to the exemption" states that repackaging, etc., does not constitute a manufacturing process. The plaintiff contends that the Legislature showed its intent to exempt goods, not otherwise immune or exempt by this language. (Plaintiff's Motion p. 20, et seq.)

9. The plaintiff may assert that the words "for sale" in Section 225 means that good brought into the jurisdiction for both transshipment and sale are exempt.

DEFENDANTS CONTENTIONS

1. Defendants contend that transshipment means "to transfer from one conveyance or line to another." (Standard College Dictionary, copyright 1968 Harcourt, Brace & World, Inc., New York) The defendants also contend that plaintiff's broad interpretation is contrary to legislative intent, as well as the plain meaning of the statute.

2. The defendants argue that exemptions are to be as narrowly construed as possible within the legislative intent.

3. The defendants further contend that plaintiff's support from the language of the statute does not consider the status of the law when the statute was enacted.

4. Defendants assert that the very administrative release upon which plaintiff relies actually take the defendants' position.

5. Defendants also contend that the California Legislature has previously enacted exemptions which go no further than the constitutional immunities already granted by U. S. Supreme Court opinion, so that this statute's not going beyond the commerce clause is not unprecedented.

6. Defendants contend that the constitutional difficulties involved in the plaintiff's broad interpretation supply abundant reasons for avoiding it.

7. Finally, defendants contend that the words "for sale" refer to the purpose for which the goods were originally manufactured and do not add to the exemption.

I

THE PLAIN MEANING

The word "transshipment" is, of course, key to Section 225. The plaintiff contends that "transshipment" includes storage, sale, sorting, distributing, and the like. There is no support for this definition in any dictionary or case researched by defendants including,

Funk & Wagnalls Standard College Dictionary, supra

Webster's New World Dictionary (1968) the World Publishing Company)
"to transfer from one ship, train, etc. to another."

Ballentine's Law Dictionary (1969) Lawyer's Cooperative-Bancroft Whitney)
"Moving cargo from one vessel to another."

Words & Phrases, Vol. 42, p. 482
"Where bill of lading allowing transshipment at certain intermediate port was stamped with clause indicating that forwarding beyond such port was to be in connection with named company,

terms 'transshipment' and 'forwarding' held interchangeable, and clauses containing such terms, not being inconsistent must be construed together.'

Note: forwarding means "To undertake under the terms of the contract with the shipper for through transportation to a point beyond the carrier's own line" (Ballentine's Law Dictionary, supra).

It should be noted that even the unabridged version of Webster's New Workd Dictionary (1971 G & C Merriam Co.) contains no other definition than that stated above.

The plaintiff has postulated some other definition. It is not clear what it wishes this court to decide, because they have not actually set forth the meaning they give to the word. They do make clear, however, that they want the word transshipment to include storage awaiting sale and delivery, the sale itself, sorting by type, and distribution.

The authorities cited thus far make it clear that the commonly accepted definition of "transshipment" is that advocated by the defendants. It is the policy of the courts to avoid giving statutory phraseology a strained or forced interpretation (Union Tool Co. v. Farmers' & M. National Bank, 192 Cal. 40, 218 P. 424 (1923)).

Thus, the plaintiff must show that the legislative intent clearly shows that the plaintiff's situation was meant to be covered (Memorial Hills Association v. Sequoia Inv. Corp., 157 Cal. App. 2d 119, 123, 320 P. 2d 567 (1958)). That is the burden placed upon the plaintiff.

II

THE LEGISLATIVE INTENT

1. The bill.

The Legislature, although not describing its purpose in the enacting law's preamble, did describe the effect it wished the statute to have on the face of the bill.

In Stats. 1975, c. 1126, the Legislature stated:

> "SEC. 4. No appropriation is made by this act, nor is any obligation created thereby under Section 2229 of the Revenue and Taxation Code, for the reimbursement of any local agency for any revenue lost by it as a result of the exemption of property from taxation by this act because the net loss of revenue to any local agency is not significant." (Emphasis added.)

It should be noted that Section 2229 requires the Legislature to reimburse local government

for the exemptions that body creates in their tax lease. That section is part of the system whereby a ceiling is placed on local tax rates.

The plaintiff's broad interpretation would put the Legislature in the position of having exempted property from the county's tax base while not providing reimbursement as it is required by statute to do. The Legislature said it did not need to provide that reimbursement because there would be little or no money loss.

The plaintiff's interpretation flies in the face of a direct statement by the Legislature that the exemption would have virtually no impact.

2. Section 2229.

One other aspect of Section 2229 is worth commenting on. That statute also requires that no exemption will be for more than five years and that no exemption will exempt more than 75% of the value of the property exempted. This statute does not comply with those restrictions. The only explanation (unless the plaintiff is urging legislative oversight) is that the de minimus character of the bill (as described by the Legislature itself) does not require compliance with Section 2229. Section 225 was not meant to be the overwhelming boon to importers which the plaintiff postulates.

3. Why pass a "de minimus" bill?

The logical question is: why could the legislature have stated that the act would have little effect and yet still enact it?

The answer rests on the distinction between an exemption (statutory) and an immunity (constitutional). The U. S. Supreme Court, and others, provide the basic immunites from state and local taxes under the U. S. Constitution. The State Legislature provides exemptions.

As the plaintiff points out in its memorandum accompanying its motion, the import-export clause immunity was in flux actually from 1959) (Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 3 L.Ed. 2d 490, 79 S. Ct. 383) until 1976) (Michelin v. Wages, supra). The California Legislature has often attempted to "freeze" a statutory interpretation by enacting that interpretation into law. On at least one other occasion it did the same thing with regard to a constitutional immunity from tax.

Revenue and Taxation Code Section 30102 exempts from the cigarette tax, goods which are in bond under the control us U. S. Customs. This exemption was actually unnecessary in light of the opinion in National Distillers Co. v. City and County of San Francisco, 141 Cal.App.2d 651, 297, P. 2d 61 (1966). Section 30102 was enacted in 1959. Of course, ten years later, bond immunity from state taxes was restricted to include only goods which were not destined for U. S. markets (American Smelting Co. v. County of Contra Costa, 271 Cal.App.

2d 437, 77 Cal. Rptr. 570 (1969)). But in 1959, the section was at least apparently covered by the immunity. The result of the legislation was to hold the status quo. (Of course, without the immunity, the statute may face equal protection or commerce clause problems, but Section 30102 has neither been tested in, nor interpreted by the courts.)

In the same vein is the exempting from the Alcoholic Beverage Tax Law all liquor in continuous transit through the state (Revenue and Taxation Code Section 32051). This exemption obviously conforms with the immunity described in Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131, 54 S. Ct. 34 (1933) and Baron v. Illinois, 227 U. S. 501, 57 L. #d 615, 33 S. Ct. 299 (1913). Those cases hold that when goods have come to rest in the taxing jurisdiction for the purposes of their owner, they are taxable. Clearly the commerce clause immunity is as broad and possible even broader than the statute.

Immunities can fluctuate leaving the exemption "out on a limb." The exemption must, then, meet all the requirements of any state action which may deny equal protection or may regulate commerce. But if the Legislature wishes to try to hold on to the immunity in this way, and if the exemption passes constitutional muster on its own, then the exemption will serve the legislative purpose.

Section 225 is such a statute. Both the import-export and commerce clauses had been

interpreted to allow more state taxation than previously thought (see VW Pacific v. City of Los Angeles, supra, and cases cited in Complete Auto Transit v. Brady, ___ U. S. ___, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977)).

The Legislature did not specifically say that the exemption was already "covered" by an immunity, but the plain meaning of the terms it used, and its refusal to limit the statute as required by Section 2229 provide abundant support for that conclusion.

4. The plaintiff's interpretation of the legislative intent.

The plaintiff has pointed to that portion of the bill which excepts goods bound for a manufacturing process from the exemption.

Actually, deleting goods in the process of manufacturing is an attempt to see that goods which were taxable when the statute was passed would not be exempted. Thus, the exception further supports the legislative finding that the bill would not exempt any goods which were then taxable.

From 1959, the import-export clause had been interpreted so that it would not provide an immunity for goods which were the "current operational needs" of a manufacturer (see Youngstown Sheet & Tube Co. v. Bowers, supra). So deleting goods "in" manufacture actually conforms the exemption to the then-existing import-export immunity.

Plaintiff further states that Section 225 excludes from the exception the process of labelling, repackaging, etc. It maintains that this exception shows the legislative intent to exempt goods held in the taxing jurisdiction for more than transshipment. The plaintiff's reliance on this language is misplaced.

The import-export clause had been interpreted to include as "current operational needs" all goods under the control of a manufacturer (Virtue Bros. v. County of Los Angeles, 239 Cal. App. 2d 220, 48 Cal. Rptr. 505 (1966)). Even out-of-state manufacturers would be taxable under Youngstown if the goods were stored in this state as their current operational needs.

But if the extent of that out-of-state "manufacturing" is repackaging or relabeling (i.e., not really manufacturing), the goods would not be current operational needs and the import-export immunity would still protect them (see Ralston Purina v. County of Los Angeles, 56 Cal. App. 3rd 547, 128 Cal. Rptr. 556 (1976) where the Appellate Court at p. 553 described pre-Michelin law as holding that labeling and casing are not manufacture).

Section 225 accomplishes these ends by, first, excluding the current operational needs of out-of-state manufacturers from the exemption, and, second, by restricting manufacturing to something more than repackaging, etc. Thus, goods being transshipped will not be exempt if they are current operational needs under

Youngstown and following cases.

Once again, the Legislature has manefested its intention to conform this legislation to the existing constitutional immunities.

III

THE ADMINISTRATIVE CONSTRUCTION

Plaintiff relies on administrative construction by the legislative counsel and by the State Board of Equalization to support its contention that goods sorted, stored, and sold are exempted by Section 225. The defendants believe that the interpretations cited are erroneous in that they ignore the obvious impact of Youngstown and the Legislature's attempt to not exempt goods destined for manufacture out of state, because those goods would not be exempt uner the pre-Michelin interpretation of the import-export clause.

But in this case it simply does not matter whether this court accepts the administrative interpretation or the County's. Using the administrative interpretation still leads to the taxability of these goods.

1. Legislative Counsel's opinion (Exhibit A to Plaintiff's motions).

On page 3 of that opinion the Legislative Counsel explains why that office determined that Section 225 exempts goods imported for transshipment plus repackaging.

"It is our understanding that such matters as 'breaking in bulk, labeling, packaging, relabeling or repackaging' are not normally procedures carried out by shipping companies, but are more usually tasks carried out by the owner of the property or by his agent. Thus, in our opinion, breaks in the continuity of the shipment of imports or exports covered by Section 225 for any of the specified purposes would not serve to deprive property of its exemption." (Emphasis added.)

The Legislative Counsel restricts the "breaks in the continuity of the shipment" to those covered by Section 225. That supports the County's interpretation.

But, storage, sale, back-up inventory, sorting, etc., are not among the purposes allowed.

Thus, the Legislative Counsel would exempt goods passing through the state whose shipment was interrupted for the purpose of repackaging, etc. But there is no support for the plaintiff's contention that the statute exempts goods whose shipment was interrupted for anything else.

Theoretically, even repackaging plus some other purpose would not save the goods from taxation because the other purpose is not set forth in the statute, and exemption must not be expanded beyond a reasonable reading (Atlantic R. R. Co. v. Phillips, 332 U. S. 168, 91 L. Ed. 1981, 67 S. Ct. 1587 (1947); Cypress Lawn Cemetery Assn.

v. San Francisco, 211 Cal. 387, 390, 295 P. 813 (1931); Weber v. Santa Barbara, 15 Cal. 2d 82, 88 98 P. 2d 492 (1940); Cedars of Lebanon Hospital v. Los Angeles, 35 Cal. 2d 729, 734, 221 P. 2d 31 (1950)). These cases go even further: the exemption must not be expanded beyond the narrowest reasonable reading.

The Legislative Counsel had indicated the purposes which it feels may cause a break in shipment and still provide an exemption under Section 225. There is no support for saying that there are others.

2. Board of Equalization letter.

The State Board of Equalization sent a letter to the Assessor upon which plaintiff also relies (Exhibit B of plaintiff's motion). The State Board letter says:

> "Additionally, because of . . . Section 225 . . . goods brought into this state from outside the United States for transshipment out of this state . . . for sale . . . are exempt from tax even if they are within the control of a California consignee provided that his reason for having them is for the purpose of breaking in bulk, labeling, relabeling, packaging, or repackaging the property prior to transshipment."

Once again, there is absolutely no support for including any other purpose in the exemption.

IV

THE PLAINTIFF'S INTERPRETATION AND THE STATE AND FEDERAL CONSTITUTIONS

Statutes must, if at all possible, be interpreted so as to be constitutional (Shealor v. Lodi, 23 Cal. 2d 647, 653, 145 P. 2d 574 (1944); Palermo v. Stockton Theatres, 23 Cal. 2d 53, 60, 195 P. 2d 1 (1948)).

Interestingly enough, the plaintiff's interpretation would distinguish between foreign goods and U. S. goods. (Even under the pre-Michelin law, according to plaintiff, owners of foreign goods would be favored over those owning U. S. goods, as well as over foreign goods bound for California market). The same services would be provided the plaintiff's goods as are provided others, yet the owner of foreign goods would be entitled to not pay for them, while his domestic competitior would.

There would appear to be no reason for this distinction. The warehousing and shipping industries service both Japanese and Hawaiian goods (as well as those shipped from other states, see Sea-Land Services Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal. Rptr. 448; 529 P. 2d 56 (1974) for a description of some of this interstate sea traffic).

1. Equal protection and uniformity of taxation.

Assuming that the Legislature simply neglected to add the plaintiff's interpretation to the statute and that it intended to exempt goods whose shipments were "interrupted" for the purposes of sorting, storage, sale, back-up inventory, and the like, the statute would be a prime candidate for a declaration of unconstitutionality because it would base the existence of preferential treatment on the geographic location of its origin.

WHYY v. Glassboro, 343 U. S. 117, 21 L. Ex. 2d 242, 89 S. Ct. 286 (1968) epecifically rejects this sort of exemption on the grounds of equal protection. In Bethlehem Steel Corp. v. Department of Water and Power, 276 Cal. App. 2d 221, 30 Cal. Rptr. 300 (1969) statute favoring U. S. products over foreign ones was stricken on the same grounds. Yet the plaintiff insists that a statute be interpreted so as to give foreign goods preference over domestic ones.

The plaintiff's interpreation is also contrary to the California Constitution. Article XIII, Section 1, in providing for the taxation of property within the state requires uniform and even-handed taxation (Watchtower Bible & Tract Soc. v. Los Angeles County, 30 Cal. 2d 426, 182 P. 2d 178 (1947) cert. den. 332 U. S. 811, 92 L. Ed. 389, 68 S. Ct. 112).

2. The commerce clause.

It is undisputed that the regulation of foreign commerce is a power of the Federal Government and not the states (Bethlehem Steel Corp. v. Department of Water and Power, supra; United States v. Belmont, 201 U.S. 324, 330; 81 L.Ed. 1134, 1139; 57 S.Ct. 758 (1937); and United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 315-316, 81 L. Ed. 255, 260-261, 57 S. Ct. 216 (1936)).

The plaintiff's interpretation suggests that the Legislature is using its power to tax and exempt in order to encourage foreign goods while discouraging domestic ones. In fact, such encouragement and discouragement constitute a regulation of foreign commerce. As such, it is contrary to the commerce clause which vests all power to regulate foreign commerce in the Federal Government.

The absurdity of the interpretation becomes even clearer when one remembers that one of the purposes of congressionally mandated tariffs is to protect American Industry (see Preamble to the Tariff Act of 1930; 19 U. S. C. Section 1202, et seq.). A review of this section makes it clear that the variation in duties paid is not related to local taxation but to the nature of the goods and the country from which they come. Plaintiff's interpretation of Section 225 would cancel or reduce the impact of many of the tariffs thereby directly countering the impact Congress intended.

Thus, the commerce clause, and the exclusive Federal jurisdiction over foreign commerce supply even more reasons to reject plaintiff's interpretation.

3. Administrative interpretation and constitutional provisions.

One of the primary reasons for the county's interpreting the statute in the way it does is because allowing any exemption beyond the commerce clause, even for repackaging, would create the same constitutional problems. But the administrative interpretations at least rely on specific language of the statute and do carry it beyond its terms. The administrative interpretation holds the constitutional problems to the minimum although not disposing of them altogether.

V

THE WORDS "FOR SALE" IN SECTION 225 DO NOT REFER TO THE GOODS' STATUS WHILE IN STORAGE

The plaintiff may assert that the words "for sale" eman that the goods must be for sale to qualify for the exemption. This logic is clearly unreasonable since it would call for the exemption of goods held by their owners for the purpose of sale, but not for other more transportation-related purposes as were involved in All American v. County of Los Angeles, decided earlier by this court.

The placement of the commas in Section 225 is also contrary to such an interpretation. The suggestion, if made, would more accurately be reflected by the following:

"

"Personal property, manufactured or produced. . . . for . . . ."

Instead the comma after the word property is omitted, so that all the qualifiers that follow the words "manufactured or produced" actually apply to them. The true sense of the section is that the goods must be "manufactured or produced . . . for sale" rather than further manufacture or use by their owners, thus again showing a consistent legislative intent to go no further than the commerce clause.

One other possibility exists that the words "for sale" qualify the words "transshipment out of this state" immediately before them. The placement of the commas make this a less tenable interpretation than the one suggested by these defendants. But even this interpretation would require transshipment for the purpose of sale rather than for use by the owner. The definition of the word transshipment is still not affected by this qualifier.

Thus, the suggestion that the words "for sale" must modify the words "personal property" is totally unsupported.

VI

CONCLUSION

The plaintiff's interpretation is not supported by the language of the statute, by the legislative statement of the statute's scope, by administrative interpretation, or by the Federal or State const constitutions.

Adding language by implication is not only unnecessary, it flies in the face of the general rule in this state (and throughout the country) that the plaintiff must show that they clearly fall within the exemption. (Cypress Lawn Cemetery Assn. v. San Francisco, supra; Atlantic R. R. Co. v. Phillips, supra.)

That showing has not been made.

DATED:

Respectfully submitted,

JOHN H. LARSON, County Counsel

By_____ss
JAMES DEXTER CLARK
Deputy County Counsel
Attorneys for Defendants

DECLARATION OF JAMES DEXTER CLARK

I, JAMES DEXTER CLARK, declare:

That I am the Deputy County Counsel assigned to this matter.

That I have reviewed recent legislation to determine what amounts of losses to counties are being reimbursed pursuant to Revenue and Taxation Code Sections 2201, et seq., which provide a maximum ceiling on local tax rates and extend reimbursement for the localities' loss of funds as a result of exemptions. The chapters I reviewed are attached. The show that the legislature specifically authorized amounts of reimbursements ranging from $3,750.00 to $180,000.00.

That my files reveal that well over 30 suits have been filed by importers contesting the same issue as is involved in this case. Cases are presently being served against the County on this issue at the rate of one per week. I conservatively estimate that those actions involve over $1,000,000.00 of actual taxes which the importers claim they are exempt from paying as a result of Revenue and Taxation Code Section 225. I have knowledge of the fact that many importers have not filed suit and that many more suites of the same type are expected.

The above-facts are within my own personal knowledge. If called upon to testify thereto, I could competently do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of December, 1977, at Los Angeles, California.

_____ss

JAMES DEXTER CLARK

(Exhibits Omitted)

DECLARATION OF ARTHUR LEW

I, ARTHUR LEW, declare:

That I am an Appraiser II with the County of Los Angeles and am presently assigned legal and legislative research matters. I hold a B. S. Degree in Marketing Management Ressearch which included studies in distribution methods. I also hold a Juris Doctor degree and am admitted to the California Bar.

That I have researched the are of distribution pattersns of goods, and I have found that there is a flow of traffic of substantial proportions by which goods arrive in California from other states for distribution throughout the United States or throughout various regions of the United States. Thus, there is a flow of traffic which corresponds with that described in Revenue and Taxation Code Section 225 which involves United States goods.

That I have also reveiwed the case Sea-Land Services Inc. v. County of Alameda, 12 Cal. 3d 772, and found described therein a substantial amount of sea-borne traffic from the east coast to California via the Panama Canal.

The above cacts are within my own personal knowledge. If called upon to testify thereto, I could competently do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of December, 1977, Los Angeles, California.

_____ss
ARTHUR LEW

(Declaration of Mailing Omitted)

CAPTION OMITTED

DECLARATION OF
JOSEPH W. GRANT

SUPERIOR COURT OF THE
STATE OF CALIFORNIA, FOR THE
COUNTY OF LOS ANGELES

I, JOSEPH W. GRANT, declare:

That I am a Senior Appraiser for the County of Los Angeles with seven years of practical experience in appraising property similar to that involved in this action. Ia am certified as an appraiser by the State of California.

I have, during the last seven years, appraised and supervised appraisals of many firms similar to Walter Fleischer Co., Inc. I have reviewed the information submitted by Walter Fleischer Co. All firms with the varied inventory which the plaintiff has informed us it has, sort their inventory by type. Based upon the information supplied by the plaintiff for the 1976-77 year, I believe it does sort its goods by type once unloaded from transport for storage.

I have reviewed the financial information supplied by plaintiff for the 1976-77 year. The amount of inventory in stock on the lien date and the cost of goods sold for the entire year (extrapolated fromthe first 8 months) indicate a turnover rate of 3.4 per year. In other words the average stock will be in the plaintiff's inventory for over 3-1/2 months.

The above-facts are within my own personal knowledge. If called upon to testify thereto, I could competently do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of December 1977 at Los Angeles, California.

_____ss

JOSEPH W. GRANT

(Declaration of Mailing Omitted)

CAPTION OMITTED

Ruling on submitted matter

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

WALTER FLEISHER CO., INC., v.
COUNTY OF LOS ANGELES, et al.,
No. 195366

The matter, submitted December 27, 1977, is now ruled on as follows: Counsel need no reminder that this Court rendered summary judgment for the plaintiff in All American Distributing Co v County of Los Angeles, # C182 173, in which the facts are somewhat similar although not identical to those in the present case. The principal distinction is the shipment out of California of all of All-American's California-stored goods, while in Fleisher only 74.2% of its shipments were out of state. Thus, pursuant to secs. 225 and 225.1(1) Rev. & Tax Code, Fleisher seeks an exemption of 74.2% of its $213,468.95 inventory.

Despite the fact that "foolish consistency is the hobgoblin of small minds,"* this Court is still of th of the view that All-American was decided correctly and that there is no essential distinction in Fleisher which requires a different result.

Summary judgment is rendered for plaintiff; its counsel shall prepare and serve an appropriate judgment.

*possibly anonymous; at least unacknowledged.

A copy of this minute order is sent to counsel this date.

CAPTION OMITTED

NO. C 195 366

SUMMARY JUDGMENT

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

WALTER FLEISHER CO., INC., v.
COUNTY OF LOS ANGELES, et al.,
No. 195366

This cause having come on regularly for hearing in Department 85 of the above entitled court, the Honorable George M. Dell, Judge Presiding, on December 27, 1977, pursuant to duly noticed Motion for Summary Judgment filed by the plaintiff; Gerald T. Manpearl and Thomas C. Corcovelos for Baker, Ancel and Redmond, appearing for plaintiff Walter Fleisher Co., Inc.; and James Dexter Clark, Deputy County Counsel, for the defendants County of Los Angeles and City of Los Angeles; and the Court having considered the pleadings, the documents presented and filed with respect to the motions, and having heard and considered the contentions of counsel; and the Court having heretofore granted the said motion of plaintiff on the statutory ground that there is no defense to the action, and that no triable issue of fact is presented:

IT IS ORDERED that the Answer of the defendants County of Los Angeles and City of Los Angeles be and it is stricken.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Walter Fleisher Co., Inc., have judgment against the defendants County of Los Angeles and City of Los Angeles in the sum of $3,595.99 as principal, and $265.41 as interest, for a total of $3,861.40.

TI IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Walter Fleisher Co., Inc. have judgment against the defendants County of Los Angeles and City of Los Angeles for costs in the sum of $_____.

Dated this 7th day of March, 1978.

GEORGE M. DELL
Judge of the Los Angeles
Superior Court

(Declaration of Mailing Omitted)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

WALTER FLEISHER COMPANY,

Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of
the State of California,
Second Appellate District
AND
PETITION FOR CONSOLIDATION, IN THE EVENT CERTIORARI IS GRANTED, WITH SEARS, ROEBUCK & CO. V. COUNTY OF LOS ANGELES
OCTOBER TERM, 1978 78-1577

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. _____

WALTER FLEISHER COMPANY,

Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Walter Fleisher Company, Inc., a corporation, respectfully prays that a writ of certiorari issue to the Court of Appeal of the State of California, Second Appellate District, to review that court's decision holding that California Revenue and Taxation Code Section 225 (set forth in Appendix "A" hereto), provided an unfair exemption from property taxes for imported goods, thereby discriminating against interstate commerce, in contravention of the Commerce Clause of the United States Constitution.

In holding Section 225 unconstitutional the court relied on an earlier decision of the Court of Appeal in Zee Toys v. County of Los Angeles,

85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1978). This Court granted certiorari in the Zee Toys case, sub. nom. Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577, on October 1, 1979. The Supreme Court of California denied a timely Petition for Hearing.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, was not certified for publication and will not be reported. A copy of the opinion is set forth in Appendix "B" hereto.

JURISDICTION

The decision of the Court of Appeal was filed July 25, 1979. A Petition for Hearing in the California Supreme Court was denied on September 20, 1979.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether California Revenue & Taxation Code Section 225, which grants a property tax exemption to imported inventories no longer in transit, but intended for transshipment out of the State of California, violates the Commerce Clause of the

of the United States Constitution because a similar exemption is not provided to interstate goods.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, which grants to Congress the right: "To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

The state statutes involved are California Revenue and Taxation Code Sections 225 and 225.1, set forth in Appendix "A."

HOW THE FEDERAL QUESTION AROSE

The question presented in this petition was considered on the merits by the California Court of Appeal in the opinion filed by that court. Since such claims were passed upon by the highest court hearing this case, there is no preliminary issue as to the proper presentation of the federal claims. (See Raley v. Ohio, 360 U.S. 423, 436 (1959).)

The Court of Appeal opinion demonstrates that the question raised in this petition was both considered and decided, the court stating:

"The effect of this statute is to provide a property tax exemption for goods in foreign commerce. No such exemption is provided, however, for goods in California which are part of interstate commerce. In Zee Toys, Inc. v. County of Los Angeles, supra, 85 Cal. App. 3d 763, the court concluded that the tax is a discriminatory one, and as such is forbidden by the Commerce Clause of the United States Constitution."

PETITION FOR CONSOLIDATION

Pending before this Court is Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577. The petition for writ of certiorari was granted by this Court on October 1, 1979.

The facts in the instant case are almost identical to the facts in Sears, Roebuck & Co. v. County of Los Angeles. In both instances the Petitioner held imported inventory in warehouses located in Los Angeles County pending transshipment out of the State of California. The only distinction is that Sears, Roebuck & Co. is a retailer, and Petitioner herein is a wholesaler. It is submitted that such distinction has no legal effect on the case; however, to the extent there is or may be claimed any distinction, consolidation will provide a resolution of all of the questions involved regarding a resolution of all of the questions involved regarding the validity of

California Revenue and Taxation Code Section 225.

If this Court grants this petition for certiorari, and consolidates, Petitioner herein is willing to be bound by the briefing schedule set forth by this Court for Sears, Roebuck & Co. v. County of Los Angeles. The County of Los Angeles, Respondents in both cases, has consented to consolidation in the event this Court grants the petition for certiorari. Such consent is attached as Appendix "C" hereto.

STATEMENT OF THE CASE

Following the California Supreme Court decision in Volkswagen Pacific v. City of Los Angeles, 7 Cal. 3d 48, 496 P.2d 1237 (1972), assessors throughout the State of California began denying the import-export exemption to importers who had unloaded merchandise from seagoing cargo containers. As a result of such denial, importers in large numbers began leaving the State of California and finding warehousing opportunities in other areas of the country.

In response to this deteriorating economic situation, the California Legislature passed Revenue and Taxation Code Sections 225, et seq., commonly known as the California Free Port Law.

Section 225 provides an exemption from ad valorem property taxes for (1) personal property manufactured or produced outside this State and

brought into the State for transshipment to points outside the United States, and (2) personal property manufactured or produced outside of the United States and brought into this State for transshipment to points outside of this State. It is patterned after free port or transshipment statutes enacted in approximately 35 other states. This and Zee Toys v. County of Los Angeles, Sears, Roebuck & Co. v. County of Los Angeles, supra, are the first cases in which any state statute providing a transshipment exemption has been struck down by a state or federal court.

Petitioner Walter Fleisher Company, Inc., is an importer, warehousing goods in the County of Los Angeles for sale and subsequent transshipment to customers, both within and without the State of California. For the 1976-1977 tax year, petitioner applied for and was denied an exemption. Petitioner filed suit seeking a refund, and judgment was entered for petitioner in the trial court on a motion for summary judgment.

The County of Los Angeles and City of Los Angeles took an appeal from the judgment. Prior to decision in the instant case, the Court of Appeal, Second Appellate Distict, Division Three, held Revenue and Taxation Code Section 225 unconstitutional in the consolidated case of Zee Toys v. County of Los Angeles and Sears, Roebuck & Co. v. County of Los Angeles, supra. Relying upon the Zee Toys decision as controlling authority, the Court of Appeal reversed the instant judgment, holding that Section 225 violated the Commerce Clause of the United States Constitution, that the local government defendants had standing to raise the constitutional

objection, and that the appropriate remedy was to invalidate the exemption rather than to extend the exemption to the parties against whom the Court of Appeal felt the statute discriminated.

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEAL HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION OF SUBSTANCE IN A MANNER CONTRARY TO APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeal decision used a standard which would strike down any state statute differentiating between interstate and foreign commerce, no matter how reasonable the distinction. Such interpretation is in contrast to the modern trend of decisions allowing greater latitude to the states in instituting taxing policies.

In Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), this Court overruled Low v. Austin, 80 U.S. (13 Wall.) 29 (1972), holding that nondiscriminatory ad valorem property taxes did not constitute an import or export under Article I, Section 10, Clause 2 of the U.S. Constitution.

In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), this Court overruled Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), and held that a state, under appropriate conditions, may tax directly the privilege of conducting interstate business.

In Washington Revenue Dept. v. Assoc. of Washington Stevedoring Companies, 435 U.S. 734 (1978), this Court overruled Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U.S. 90(1937), and put to rest the direct/indirect test, and reiterated the necessity to balance the burden placed on interstate commerce by the benefits to the State. This Court stated: "Respondents, therefore, have demonstrated no impediment imposed by the tax upon the regulation of foreign trade by the United States." (435 U.S. 754.)

In Boston Stock Exchange v. State Tax Comm'r., 429 U.S. 318 (1977), this Court invalidated a New York tax scheme which was designed to provide a commercial advantage to local businesses (the New York Stock Exchange) to the detriment of out-of-state stock exchanges. The Court, however, cautioned:

> "On various occasions when called upon to make the delicate adjustment between the national interest and free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular

circumstances in each case."
(429 U.S. 329.)

The statute involved in the instant case makes no distinction between out-of-state and in-state residents or businesses. On the contrary, both are given the economic advantage of utilizing the Free Port Law if their goods qualify. There was no evidence or finding of interference with commerce. The Court of Appeal assumed that any distinction had an effect on interstate commerce, and applied a "per se" standard on the grounds that any interference or potential interference constituted an impermissible burden under the Commerce Clause. This case therefore raises an important issue concerning the limitations imposed by the Commerce Clause on the power of a state to enact tax statutes to meet local needs.

The inventory in the case had come to rest in California, and was not still in transit for purposes of prohibiting taxation under the Commerce Clause. Such goods were therefore part of the mass of goods in the State of California, subject to ad valorem property taxes under Michelin v. Wages, supra, and the State may require that they participate and bear their fair share of local services. However, unlike the issue in Michelin v. Wages, the question now is whether the State must tax such inventory together with all other inventory in the State.

B. REVIEW BY THIS COURT IS WARRANTED TO RESOLVE A CONFLICT BETWEEN STATE COURT DECISIONS WITH RESPECT TO THE CONSTITUTIONALITY OF "FREE PORT LAWS."

It is common practice for states to encourage local industry by providing tax exemptions. Examples are domestic wines while aging in California, dairy products in Wisconsin, certain fish products in Louisiana, and wheat products in the Midwestern states. With increasing frequencies states have been providing exemptions to inventories, and especially inventories stored for transshipment. "Not only are inventories exempt in the few but very important states that exempt all personal property . . . but they are wholly or partially exempt in numerous other states and are almost universally exempt if they have been brought into a state for storage or other limited activities before being shipped out of the state." (National Tax Journal, Property Tax Developments: Modernization, Classification, Site Value Taxation, 19:322, 324 (Sept. 1976).)

Such classification statutes are tested under Equal Protection principles.

Over 35 states have some type of free port exemption. A substantial number of these statutes grant out-of-state or foreign products an exemption which is denied to similar products manufactured or grown in the United States or in the state in

question. These distinctions are based on the origin of the goods, the same distinction struck down in the instant case.

In Appeal of Martin (S. Ct. N. C., 1974) 209 S. E. 2d 766, the court upheld a statute providing an exemption based on the origin of the goods and based on the residence of the owner of the goods. The statute specifically described its purposes:

> "It is hereby declared to be the policy of this state to use its system of property taxation in such manner, through the classification of the aforementioned property, as to encourage the development of the ports of North Carolina . . . [and] to encourage the development of the State of North Carolina as a distribution center." (Emphasis added.)

Under the North Carolina statute a distributor, such as Petitioner, who warehouses in non-public facilities would: (a) be taxed on goods purchased domestically; but, (b) given an exemption on imported goods. This is the same distinction struck down in the instant case. (See, State Bd. of Tax Comm'rs. v. Carrier Corp. (S. Ct. Ind., 1977) 365 N. E. 2d 1153, 1385.)

If Boston Stock Exchange and Michelin Tire Corp. have been correctly interpreted in the instant case and in Zee Toys, then both the North Carolina and Indiana taxing schemes would also have to fail for violating the Commerce Clause. (See also, Nash Sales v. City of Milwaukee (S. Ct. Wisc.,

1929) 224 N.W. 126.)

In Allied Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959), an Ohio statute exempted merchandise belonging to non-residents held in storage but taxed similar property belonging to residents. This Court upheld the statute against Equal Protection arguments.

In Raley & Bros. v. Richardson, 264 U.S. 157 (1924), this Court upheld a Georgia tax upon brokers or commission merchants dealing in intra-state goods, which tax was not imposed upon similar brokers dealing in goods in interstate commerce. This Court rejected arguments that such distinction violated the Commerce Clause.

According to the Japan Lines Ltd. v. County of Los Angeles, ___ U.S. ___, 99 S.Ct. 1813 (1979), the policies animating the Import-Export Clause and the Commerce Clause (with regard to foreign commerce) are much the same: (1) to permit the federal government to speak with a single voice in regulating commercial relations with foreign governments, (2) to prevent the States from diverting import revenues to their treasuries rather than the federal treasury, and (3) to prevent States with ports of entry from exacting tolls which raise the price of goods to the rest of the Nation. 99 S.Ct. at 1822, n. 14. It is readily apparent that none of these policies can be violated by an exemption, as opposed to a tax. The section 225 transshipment exemption does not frustrate the attainment of federal uniformity of tax treatment of imports and does not involve any risk of retaliation from abroad. Cf. 99 S.Ct.

at 1823-24. The transshipment exemption invites reciprocity of tax relief for our expoerts rather than inviting the retaliation that a tax would encourage in similar circumstances. Manifestly, there is no violation of the second policy behind the Import-Export Clause and the foreign Commerce Clause for the simple reason that a tax exemption cannot divert federal import revenues to state coffers. As to the third policy, the transshipment exemption invites reciprocity of tax relief for United States exports rather than inviting the retaliation that a tax on foreign commerce might encourage.

In short, the principal purpose of the federal constitutional provisions respecting foreign commerce is to assure that the States do not impede or obstruct imports and exports. While a tax can burden foreign commerce and obstruct commercial intercourse between nations, a tax exemption has no such effect. The Court of Appeal in Zee Toys missed this fundamental distinction entirely and plain misunderstood the policy behind the federal constitutional provisions applicable to foreign commerce. The Court of Appeal in the instant case followed Zee Toys in deference to the principle of stare decisis. Nevertheless, the error in both Court of Appeal decisions is clear.

SUMMARY

The shield of the Commerce Clause is generally sought by taxpayers attempting to prevent state local taxation. Rarely if ever has such shield been

successfully invoked by a taxing subdivision of the state to attack the state's own taxing scheme.

In Boston Stock Exchange, supra, this Court struck down, on Commerce Clause grounds, a New York taxing scheme providing benefits to residents, to the detriment of non-residents. In Allied Stores of Ohio, supra, this Court upheld an Ohio statute providing a tax benefit to nonresidents to the exclusion of residents, attacked on the basis of Equal Protection.

In the instant case no distinction is made between residents and nonresidents; each are afforded the benefits of the transshipment exemption. The statute in question merely provides an exemption to one type of goods, to wit, goods which had been imported from abroad.

In Japan Line, Ltd. v. County of Los Angeles, supra, this Court held that California property tax applied to foreign owned instrumentalities of international commerce prevented the Federal Government from speaking with one voice in international trade. In contrast, in the instant case the goods which are exempted have come to rest in California, are part of the mass of goods located in the state, and are fully subject to the power of the state. (Michelin Tire v. Wages, supra.) The risk that foreign commerce will be burdened by the instant exemption is so remote that it can be said to be nonexistent. (Bob-Lo Excursion Co. v. Michigan, 33 U.S. 28 (1948).)

To allow the California Court of Appeal decision to stand would place in jeopardy free

port or transshipment statutes throughout the nation, it would question every local statute attempting to encourage public policy or local economic goals by providing benefits to one type of activity or product while denying them to other activities or products. The decision is in conflict with the results and reasoning of Michelin v. Wages, Complete Auto Transit, Inc. v. Brady, Washington Rev. Dept. v. Stevedoring Ass'n., Boston Stock Exchange v. State Tax Comm'r., and Raley & Bros. v. Richardson.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted, and this case consolidated with Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577, and the parties directed to comply with the same briefing schedule.

Respectfully submitted,

GERALD T. MANPEARL
RUSSELL IUNGERICH

Attorneys for Petitioner

APPENDIX A

"Section 225. Personal property manufactured or produced (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transhippment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property.

"Section 225.1. A person claiming an exemption under Section 225 may either claim this exemption by (1) a percentage method of determining property held for transshipment on hand at a particular location by allocating a portion of the total inventory, using the percentage determined by dividing the total out-of-state shipments by the taxpayer from that location during the preceding year by the total of such shipments from that location during such year, or (2) an actual method as evidenced by contracts of sale on the tax lien date, and a full, true and correct inventory of all property held for transshipment together with the date of receipt of the same, the date of withdrawal of the same, the point of origin thereof, and the point of ultimate destination thereof.

"Section 225.2. Any property exempted under Section 225 which is reconsigned to a final destination in this state shall be subject to excape assessment procedures.".

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

WALTER FLEISHER CO., INC., Plaintiff and Respondent,	)	2d Civil No. 53651
vs.	)	(Super. Ct. No.
COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,	)	C195366)
Defendants and Appellants.	)	Court of Appeal-Second Dist.
	)	FILED Jul 25 1979
		Clay Robbins, Jr., Clerk
		Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. George M. Dell, Judge. Reversed.

John H. Larson, County Counsel, and James Dexter Clark, Deputy County Counsel, for Defendants and Appellants.

Baker, Ancel, Redmond & Hall; Evans, Manpearl & Harter and Gerald T. Manpearl, for Plaintiff and Respondent.

Defendants have appealed from a judgment entered in favor of plaintiff following the granting of plaintiff's motion for summary judgment.

Plaintiff's motion for summary judgment was premised on its claimed right to tax exemption under California Revenue and Taxation Code section 225. That statute having been declared unconstitutional in Zee Toys, Inc. v. County of Los Angeles (1978) 85 Cal. App. 3d 763, (hrg. den. Cal. S. Ct. 1/17/79), we reverse the judgment.

Plaintiff is an importer of goods imported and manufactured in foreign countries. The goods are shipped to plaintiff in California where they are unloaded into his warehouses, awaiting sale and delivery to his customers located throughout the United States. The goods are stored for indefinite periods of time awaiting such sale and delivery. Ad valorem property taxes were assessed by the County Assessor of Los Angeles for the fiscal year July 1976 through June 1977. Those taxes were imposed on all of the merchandise stored in plaintiff's warehouses on the lien date, March 1, 1976. Plaintiff paid the assessed taxes under protest, claiming an exemption under Revenue and Taxation Code section 225. After exhausting his administrative remedies, plaintiff filed the within action against the County of Los Angeles, seeking refund of the taxes paid pursuant to said exemption. Summary judgment in the sum of $3,861.40 was awarded to plaintiff on that complaint.

Appellants challenge the validity of the court's ruling contending, inter alia, that the statute is

unconstitutional. Revenue and Taxation Code section 225 provides as follows:

> "Personal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property."

The effect of this statute is to provide a property tax exemption for goods in foreign commerce. No such exemption is provided, however, for goods in California which are part of interstate commerce. In Zee Toys, Inc. v. County of Los Angeles, supra, 85 Cal. App. 3d 763, the court concluded that the tax is a discriminatory one, and as such is forbidden by the commerce clause of the United States Constitution. The court cited and quoted from numerous United States Supreme Court decisions which have established, explained, and expanded the commerce power of the United States government and defined the limits of the power of states to interfere therewith. Those cases establish that both foreign commerce and interstate commerce are subject to the exclusive control of the federal government and that "the very purpose of the

commerce clause was to create an area of free trade among the several states." (McLeod v. J. E. Dilworth Co. (1944) 322 U.S. 327, 330.)

Respondent argues here, as did respondents in Zee Toys, that the effect of the exemption in question is to encourage foreign commerce; respondent argues that this is distinguishable from a tax, duty, or impost which interferes with and thus discourages foreign trade. The response of the court in Zee Toys is apposite here:

> "In any event, there is no merit to the argument that only the imposition of discriminatory burdens upon foreign commerce interferes with Congress' power to regulate in that field. As pointed out in Michelin, supra, 423 U.S. at p. 286 [46 L.Ed.2d at p. 504], discriminatory taxes, if 'applied selectively to encourage or discourage . . . importation in a manner inconsistent with federal regulation' are invalid. (Italics added.)" (Id. at p. 775.)

Respondent has cited numerous cases in which state taxing schemes have been found not violative of the United States Constitution and argues that thus Zee Toys was wrongly decided. Respondent also contends it has been unable to find any other case which invalidates an exemption from tax, as opposed to a tax. Even if no such cases exist, the distinction between an invalid tax and an invalid exemption is one of form rather than substance. The evil sought to be prevented is the result--the taxation of some forms of commerce to the exclusion of others. We see no

significance in the fact that California chose to tax interstate commerce by enacting an express exemption for foreign commerce. The discriminatory effect as between interstate and foreign commerce is the same.

Respondent contends that a recent decision of the United States Supreme Court, Japan Line, Ltd. v. County of Los Angeles, ___ U.S. ___ (47 U.S. Law Wk. 4477), "has in fact placed grave doubt upon the validity of the holding of Zee Toys v. County of Los Angeles." We disagree. In Japan Line, the California Supreme Court had upheld a property tax imposed on appellant's containers temporarily present in California. The containers were based, registered, and subjected to property tax in Japan, and were used exclusively in foreign commerce. The U.S. Supreme Court addressed the issue of whether instrumentalities of commerce used "exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a state." (Id. at p. 4480.) The court observed: "If the state tax 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State,' no impermissible burden on interstate commerce will be found. [Citations.]" (Emphasis added.) (Id. at p. 4480.)

But, the Court added, when construing the power to regulate commerce with foreign nations, "a more extensive constitutional inquiry is required."

The court held that, in addition to answering the nexus, apportionment, and nondiscrimination issues, a court must also inquire whether the tax creates a substantial risk of international multiple taxation and whether the tax prevents the federal government from speaking "with one voice when regulating commercial regulations with foreign governments." (Id. at p. 4481.)

Respondent's contention that the exemption in the instant case must be upheld because of the ruling in Japan Line is not well taken. In this case, we do not validate the imposition of a tax on foreign commerce. Rather, we invalidate a discriminatory exemption which favors foreign commerce over interstate commerce. As the language quoted from Japan Line clearly reflects, a tax which discriminates against interstate commerce is violative of the United States Constitution. Inferentially, of course, an exemption which has similar discriminatory effect is equally invalid.

We believe that Zee Toys, supra, is well reasoned and rightly decided. We agree that, "by granting an exemption to foreign goods which is withheld from interstate goods, Revenue and Taxation Code section 225 violates the commerce clause of the United States Constitution." Zee Toys, Inc. v. County of Los Angeles, supra, 85 Cal. App. 3d at p. 777.)

Standing to Raise the Constitutional Issue

Respondent contends that appellants do not have standing to contest the constitutionality of

section 225, citing Community Television of So. Cal. v. County of Los Angeles (1975) 44 Cal. App. 3d 990, and Appeal of Martin (1974) 286 N.C. 66, 209 SE 2d 766. Those cases held that government entities did not have standing to challenge the validity of state statutes under the equal protection clause of the federal Constitution, since the plaintiffs were not members of the "class allegedly discriminated against." This same contention was rejected in Zee Toys, the court there noting that the challenge in this case is not one of equal protection. Therefore, the class-membership requirement does not apply. Appellants have standing because they have "a personal stake in the outcome" of this litigation. (Baker v. Carr (1962) 369 U.S. 186, 204.)

The judgment granting appellant exemption from county ad valorem property taxes under Revenue and Taxation Code section 225 is in error.

The judgment is reversed; each party to bear its own costs.

NOT FOR PUBLICATION.

ALARCON, J.

We concur:

KINGSLEY, Acting P. J.

JEFFERSON (Bernard), J.

APPENDIX C

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October 16, 1979 (213) 974-1833

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Los Angeles, CA 90071

Re: Sears, Roebuck & Co. v. County of Los Angeles; No. 78-1577
and
Walter Fleisher & Co. v. County of Los Angeles; No. C 195366

Dear Mr. Manpearl:

This will confirm that in the event the United States Supreme Court grants your Petition for Writ of Certiorari in Walter Fleisher & Co. v. County of Los Angeles, we have no objection to such case being consolidated with Sears, Roebuck & Co. v. County of Los Angeles No. 78-1577, as long as the issues you raise are the same as those in the Sears matter. Because the Court Clerk has

indicated that no time extensions will be allowed, we cannot stipulate to the consolidation if any other matter than the problem of the constitutionality of §225 is raised.

Very trul yours,

JOHN H. LARSON
County Counsel

/s/ James Dexter Clark

By
JAMES DEXTER CLARK
Deputy County Counsel

JDC:lvw

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-700

WALTER FLEISHER CO., INC.,
a corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES and
CITY OF LOS ANGELES,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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INTRODUCTION

This case involves essentially the same issues as those presented in Sears, Roebuck & Co. v. County of Los Angeles (Docket No. 78-1577). A Writ of Certiorari has been granted in Sears.

This case presents some variation in the Sears facts and will, therefore, provide the Court with more facts from which to judge the

constitutionality of California Revenue & Taxation Code §225.

THE RESPONDENTS' POSITION REGARDING THE PETITION FOR WRIT OF CERTIORARI

The Respondents desire that the Petition for Writ of Certiorari be granted. As previously indicated to the Court, the Respondents believe that this case should be consolidated with Sears, Roebuck & Co. v. County, supra.

THE RESPONDENTS ALSO DESIRE A SPEEDY RESOLUTION OF THESE MATTERS. THE CLERK OF THIS COURT HAS INDICATED THAT ORAL ARGUMENT IN SEARS IS TENTATIVELY SCHEDULED FOR THE SECOND WEEK OF ORAL ARGUMENT IN JANUARY. THE RESPONDENTS DESIRE THAT THIS SCHEDULE BE MAINTAINED.

Toward that end, counsel for Petitioner in this case has stated that he has prepared his legal arguments and can file the Petitioner's Brief within a matter of days after the Court grants the Writ of Certiorari. Respondents can file their brief within days thereafter.

The Respondents therefore respectfully urge this Court to grant the Petitioner's Writ for Certiorari, consolidate this case with Sears, Roebuck & Co. v. County (No. 78-1577) and order briefs to be submitted forthwith.

Counsel for Respondents herein are also counsel for Respondents in Sears, Roebuck. Both Respondents desire consolidation and a speedy determination of the issues herein.

In the alternative, if the Court believes that oral argument cannot be set in January if the cases are consolidated, then another possibility would be to hold this case pending the outcome in Sears.

THE ISSUE

The issue presented by both this case and Sears, Roebuck & Co. v. County, supra, is whether California Revenue & Taxation Code §225 is unconstitutional under the commerce clause (Art. I §8 Cl.), and Congress' statutory scheme regarding tariffs (e.g., the Tariff Act of 1930, and the Trade Act of 1974).

STATEMENT OF THE CASE

The California Court of Appeal decided this case (see Appendix to the Petition for Certiorari). The panel deciding this case was different than that deciding Sears, Roebuck & Co. v. County, but similarly ruled Revenue & Taxation Code §225 to be unconstitutional.

California Revenue & Taxation Code §225 was enacted before this Court's decision in

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). The legislative purpose was not to take away from Congress the power it has to adjust the difference between foreign and domestic goods (see the record in Sears, Roebuck & Co. v. County at p. 219, last paragraph).

Revenue & Taxation Code §225 became effective on January 1, 1976. The opinion in Michelin Tire Corp. v. Wages, supra, was rendered on January 14, 1976. The California tax lien date is March 1st. As a result, Revenue & Taxation Code §225 never operated under "pre-Michelin" conditions.

The Court of Appeal was faced with a situation where (despite good intentions) a statute regulated foreign commerce with the effect of discriminating in favor of foreign goods and against domestic goods passing through the state. The Court of Appeal had a choice. It could have either "redesigned" the statute to prevent these effects, or it could have told the legislature to "go back to the drawing board." It took the latter approach.

The Court of Appeal also held that the County had the right to raise the issues involved here and that it could not redraft Revenue & Taxation Code §225 so as to conform to the U.S. Constitution and the "Tariff Acts." Neither of those questions are presented to this Court in either this case or Sears, Roebuck & Co. v. County, supra.

The legislature has now created an exemption which does not cause discrimination but still has the desired effect of encouraging the shipment of goods into the state. In fact, the legislature gave an exemption to all inventory. (Calif. 1979 Stats. c. 1150 §7.)

ARGUMENT

The Respondents believe that the Court of Appeal was correct.

Both Hines v. Davidowitz, 312 U.S. 52 (1941) and Boston Stock Exchange v. State Tax Comm., 429 U.S. 318 (1976) hold that state regulations causing discrimination, especially in foreign commerce, are within Congress' exclusive authority to regulate commerce.

Congress has exerted that authority as well. Over the history of this country, it has established customs duties specifically designed to regulate foreign commerce and portect domestic industry (see J. W. Hampton & Co. v. United States, 276 U.S. 394 (1928) where this protectionist policy was upheld). Both the Constitution (Art. I §8 Cl. 1) and the Tariff Act of 1930 require that those duties be uniform.

Revenue & Taxation Code §225 alters the balance established by Congress and invades Congress' exclusive authority to regulate foreign commerce.

Revenue & Taxation Code §225 causes discrimination between out-of-state manufacturers and out-of-state customers merely on the basis that the goods are passing through the state.

Revenue & Taxation Code §225 is not a tax. Like the statute in Boston Stock Exchange v. State Tax Commission, supra, it creates a regulation between forms of interstate and foreign commerce.

No other state property tax exemption has the effect of distinguishing between out-of-state manufacturers and out-of-state customers on the basis that the goods are temporarily in the state. 1/

1/ Only four state statutes have anguage which makes foreign-interstate distinctions. They exempt goods as "in transit" however. The Court of Appeal in this case and in Sears, Roebuck & Co. v. County, supra, relied heavily on the fact that "in transit" is parallel to the commerce clause immunity for moving goods. The interpretation of §225 and the three statutes is very different (see Fla. Tax & Fin. Code §196.001; Ga. Pub. Rev. Code §92-186; Miss. Ad Valorem Tax §27-31-13, and La. Const. Art. 7 §21(D)). Even if those statutes were interpreted in the same broad manner as §225, their existence does not change the constitutional objection.

If many states enacted statutes favoring foreign goods over interstate goods, on the basis that they were moving through or temporarily in the state, the tariff regulations of this country would have no effect. In addition, the International Trade Commission could not require uniformity as it is required to do under the Tariff Act of 1930 (19 U.S.C. §§66, 1502(a)). Finally, this country could not tell foreign manufacturers and domestic businesses that American businesses are to be protected by a duty of 1.5%, or 2%, or 2.5%, or more, as it has done (see 19 U.S.C. §1202). This country could not make those representations because 50 states could adjust that level to suit their own interests.

CONCLUSION

The Respondents respectfully urge this Court to grant the Petition for Writ of Certiorari, consolidate this case with Sears, Roebuck & Co. v. County, No. 78-1577 and set oral argument for January 1980.

If argument cannot be set, then an alternative would be to hold this case until Sears, Roebuck & Co. v. County is decided.

Respectfully submitted,

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

Attorneys for Respondents

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-700

WALTER FLEISHER CO., INC.,

Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED OCTOBER 31, 1979
CERTIORARI GRANTED APRIL 28, 1980

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IN THE
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the trial court is not officially reported. The opinion of the Court of Appeal was filed July 25, 1979, and certified for nonpublication. The opinion is attached as Appendix B to the petition

for certiorari.[1/] A petition for hearing was denied by the Supreme Court of California on September 20, 1979.

JURISDICTION

The decision of the Court of Appeal was filed July 25, 1979, and the Supreme Court of California denied a petition for hearing September 20, 1979. The petition for writ of certiorari was filed with this Court October 31, 1979. The petition was granted April 28, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does a California ad valorem property tax statute which classifies and exempts from taxation property manufactured or produced outside the United States and imported into California for transshipment out of the state constitute a violation of the Commerce Clause of the United States Constitution because a similar exemption is not

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[1/] The Appendix attached to the Petition for Certiorari shall be referred to as "Pet. App." followed by the appropriate page numbers. The separate Appendix shall be referred to as "A." followed by page numbers. The Petition for Certiorari shall be referred to as "Pet." followed by page numbers.

provided to personal property which had originated either in California or been brought into California from other states?

2. Do the County of Los Angeles and City of Los Angeles, subdivisions of the State of California, have standing to attack the constitutionality of an exemption statute enacted by the State Legislature as part of its overall scheme of taxing personal property? 2/

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution, which provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nationa, and among the several States, and with the Indian Tribes. . . ."

2. California Revenue and Taxation Code Section 225, providing an exemption for personal property manufactured or produced outside of the State and brought into the State for transshipment out of the United States or manufactured or produced outside of the

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2/ Although the issue of standing is not set forth in the Petition for Certiorari, it is briefed herein since the issue was raised by the Court during oral argument in Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577.

United States and brought into the State for transshipment out of this State. (Complete text of the statute is set forth in Pet. App. A.)

STATEMENT OF THE CASE

Under the California Constitution, Article XIII, Section 2, the Legislature may provide for personal property taxes, exempting and classifying such property as it sees fit. Pursuant to this authorization the State of California, by both constitutional provision and by statute, has provided for a pattern of personal property taxes and exemptions. In 1975 the Legislature determined that it was in the best interests of the state to provide an exemption to certain personal property which had been manufactured or produced outside of the State of California. The State's interest in providing for such exemption was to encourage the importing, warehousing and distribution industries to locate in and use California's harbors, ports and other facilities. No distinction was made between the type of business or industry claiming the exemption, nor their residence. All persons owning personal property of the type classified by Revenue and Taxation Code Section 225 were entitled to an exemption.

Walter Fleisher Company, Inc., imports personal property from foreign countries, warehouses them in the County of Los Angeles for resale and subsequent shipment to its customers, both within and without the State of California. For the 1976-77 tax year the company was denied

an exemption under Section 225, paid its tax and filed this lawsuit. Petitioner filed a motion for summary judgment, which was granted by the trial court and judgment entered. This judgment was reversed by the Court of Appeal, relying on Zee Toys v. County of Los Angeles, 85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1978). The facts of Zee Toys v. County of Los Angeles and Sears, Roebuck & Co. v. County of Los Angeles are virtually identical. Zee Toys, who did not petition this Court for hearing, is a wholesale importer, as is the petitioner herein, Walter Fleisher Co., Inc. Sears, Roebuck & Co. is a retailer warehousing in the County of Los Angeles and distributing to its retail outlets both within and without the State. 3/

3/ Also pending in this Court is Sears, Roebuck & Co. v. County of Los Angeles, October Term 1978, No. 78-1577. Petitioner in the instant case relies on and shall attempt not to duplicate arguments set forth in the briefs filed in such litigation, including:

1. Petition for certiorari, amicus brief filed in support of petition for certiorari;

2. Respondents' opposition to petition for certiorari;

3. Brief for the petitioner, response and reply briefs;

4. Briefs of amicus in support of petitioner, including the brief of the Solicitor General of the United States.

SUMMARY OF ARGUMENTS

1. There is no constitutional prohibition under the Commerce Clause to classifying different types of goods for differential property tax treatment. A state may tax some property and exempt others based on the type of goods involved. Such distinctions are constitutional as long as they are not an unreasonable classification under the Due Process or Equal Protection Clause of the Constitution.

2. The purpose of the Commerce Clause is to prevent discrimination against interstate or foreign commerce vis a vis intrastate commerce. The Commerce Clause provides a prohibition against the State using their taxing authority to favor local or intrastate interests.

3. Even if there is a burden on commerce, either international or interstate commerce, there must be a balance of the State interest involved against the burden imposed. A per se test or a direct/indirect test is not sufficient.

4. When foreign commerce is involved, before a distinction will be struck down, the additional tests set forth in Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), must be met.

5. The County of Los Angeles and the City of Los Angeles do not have standing to contest the constitutionality of Section 225. They are not among the class protected by the Commerce Clause.

ARGUMENTS

I

THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION DOES NOT PROHIBIT A STATE FROM CLASSIFYING AND EXEMPTING FROM PERSONAL PROPERTY TAXES INVENTORY WHICH HAD BEEN IMPORTED INTO THE UNITED STATES AND IS DESTINED FOR SHIPMENT OUTSIDE OF THE STATE OF CALIFORNIA

Numerous states classify and exempt personal property in order to encourage local business. Many of these statutes provide an exemption based on the origin of the goods and/or the ultimate destination of the goods.[4/] Section 225 provides such a classification, and the unique question before this Court is whether such distinction in some manner violates the Commerce Clause of the United States Constitution.

4/ Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Appeal of Martin (S.Ct. N.C. 1974) 209 S.E.2d 766; State Bd. of Tax Comm'rs. v. Carrier Corp. (S.Ct. Ind. 1977) 365 N.E.2d 1153, 365 N.E.2d 1385; Nash Sales v. City of Milwaukee (S.Ct. Wisc. 1929) 224 N.E. 126. See also, Raley v. Ohio, 264 U.S. 157 (1924), Japan Lines v. County of Los Angeles, 441 U.S. 434 (1979).

It is submitted that a classification statute such as Section 225 does not present a traditional Commerce Clause question. No interstate business is discriminated against. The appropriate question is whether the classification is a reasonable one and will withstand the test of the Equal Protection Clause. Only in the unusual circumstances that the tax might cause embarrassment to the Federal Government in the conduct of its foreign affairs should an inquiry be made under the Commerce Clause.

Central to the decision of the Court of Appeal was the following observation:

> "The effect of this statute is to provide a property tax exemption for goods in foreign commerce. No such exemption is provided, however, for goods in California which are part of interstate commerce. . . ." (Pet. App. B-3)

Having made such observation the court relied on Zee Toys, Inc. v. County of Los Angeles and revsersed, holding Section 225 unconstitutional. It is submitted that both the Court of Appeal in the instant case and in Zee Toys has improperly applied the Commerce Clause in each of the following respects:

A. The goods in question have come to rest and are part of the mass of property in the State of California. They are no longer in commerce. The exemption statute merely provides a classification based on

the property's origin and its ultimate destination. All persons similarly engaged in such commerce are placed on an equal footing. This statute should be judged not under the Commerce Clause, but under Equal Protection doctrines;

B. Even assuming that the Fleisher court and the Zee Toys court are correct in providing an analysis under the Commerce Clause, they have failed to complete that examination. Both courts stopped at the point they found that there was a "distinction" between interstate and intrastate commerce on the one hand and foreign commerce on the other hand; both courts held a per se violation. Such analysis must include a determination of whether or not, on balance, the distinction violates Commerce Clause standards.[5/]

C. Conceding that a distinction has been made between foreign commerce and intrasate and interstate commerce, the Court must also examine the effect of such distinction under the additional

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5/ Complete Auto Transit v. Brady, 430 U.S. 274 (1977); Washington Revenue Dept. v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978); Boston Stock Exchange v. State Tax Commissioner, 429 U.S. 318 (1977); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

rules for foreign commerce set forth in Japan Lines v. County of Los Angeles, supra.

The Commerce Clause of the United States Constitution grants to Congress the power to regulate commerce (1) with foreign nations; (2) among the several states; and (3) with the Indian tribes, thereby establishing and recognizing that there is a distinction between foreign commerce and interstate commerce. This Court stated in Japan Lines, Ltd. v. County of Los Angeles, "Although the Constitution, Art. I, Section 8, Cl. 3, grants Congress power to regulate commerce 'with foreign nations' and 'among the several states,' in parallel phrases, there is evidence that the founders intended the scope of the foreign commerce power to be the greater." (441 U.S. at 448.)

The California Legislature has recognized the distinction between foreogin and interstate commerce in Section 225 of the Revenue and Taxation Code. It is not any discrimination or distinction between types of commerce that is prohibited by the Commerce Clause. The distinction must be one which the court finds creates a burden on commerce which is not outweighed by the State's need to control its own taxing policies.

The problem in this case arises because of the failure to analyze what "discrimination" means under the Commerce Clause. Most of the Commerce Clause cases involving taxation by the states make the distinction between intrastate commerce and interstate commerce. In Philadelphia v. New Jersey, 437 U.S. 617, at 623 (1977):

"Although the Constitution gives Congress the power to regulate commerce among the states, many subjects of potential federal regulation under that power inevitably escape congressional attention 'because of their local character and their number and diversity.' [citation omitted] In the absence of federal legislation, these subjects are open to control by the state so long as they act within the restraints imposed by the Commerce Clause itself. [citations omitted] The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose. That broad purpose was well expressed by Mr. Justice Jackson in his opinion to the Court in H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-538:

> "'This principal that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. Seelig, 294 U.S. [511] 527 "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of ecomonic

isolation."'

> "The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people."

The court in neither Fleisher v. County of Los Angeles nor Zee Toys v. County of Los Angeles made any finding or had any evidence before it indicating an actual discrimination which placed an undue burden on interstate commerce. This Court has thoroughly laid to rest doctrines based on an indirect ndirect test or a per se finding of Commerce C.use violations. Washington Revenue Dept. v. Association of Washington Stevedoring Companies, supra; Complete Auto Transit, Inc. v. Brady, supra.

The vital inquiry under the Commerce Clause is whether or not a state is attempting to economically isolate itself from trade with the balance of the states. The term "discriminate against" presupposes that there is someone being "discriminated for." Nothing in the theory or the actual working of Section 225 isolates California from goods or products of other states. Nor does the statute attempt to place California manufactured products, goods, or services in a position advantageous to goods of any other state. The California taxing scheme makes a discrimination involving interstate commerce, but it does not discriminate against interstate commerce. It

does not attempt to place itself in economic isolation nor does it attempt to put interstate commerce in a disadvantageous position, vis a vis intrastate commerce.

The Court of Appeal made no effort to analyze the "discrimination against interstate commerce" but merely noted that interstate commerce was treated differently than foreign commerce; therefore there was a discrimination, and that violated the Commerce Clause. The court in Zee Toys states:

> "Discrimination between (1) interstate transactions cannot be distinguished from (2) discrimination between two types of interstate transactions. Both interstate and foreign transactions are brought within the control of Congress by the same clause of the United States Constitution." (85 Cal. App. 3d at 775.)

It is submitted that to the extent the Zee Toys court relied on Boston Stock Exchange v. State Tax Commissioner, supra, such reliance is misplaced. Boston Stock Exchange involved a classic attempt by a state to provide an economic advantage to its citizens to the detriment of out-of-state business. (See, Maltz, The Berger Court, The Commerce Clause, and The Problem of Differential Treatment, 54 Ind. L. J. 165.) Even though not based on the Commerce Clause, a more appropriate analysis is found in Allied Stores of Ohio v. Bowers, which allowed a distinction to be made between the different types of commerce enumerated in

the Commerce Clause.

What New York was attempting to do was use its unique position in the securities business as an incentive not to sell or buy stock on exchanges in other states. California's taxing scheme has no such "hook" in it, so as to punish or tax to a greater extent someone who has failed to conduct business in California in preference to someone who has funneled their business through California. The exemption is granted to one and all who wish to ship their goods into or out of foreign commerce through California. There is no analysis by which the tax can be construed to extract a penalty from someone in interstate commerce for having failed to conduct their foreign business through California. The California taxing scheme treats all goods of the same class the same.

The test for the types of distinctions a state may make in imposing its taxes is succinctly set forth in Allied Stores of Ohio v. Bowers, supra, at 526-527:

> "The states have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interest. Of course, the states, in the exercise of their taxing power, are subject to

the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The state may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [citations omitted] 'To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' [citation omitted]"

The Court went on to state, at 528:

"That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or different in state policy. . . .

"Coming directly to the concrete problem now before us, it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the state of needed and useful industries by exempting them,

though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

The test for whether a state tax violates the Due Process Clause, and whether it creates an unconstitutional burden upon interstate commerce are virtually identical. This Court stated, in National Bellas Hess v. Dept. of Revenue, 386 U.S. 753, 756:

> "National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the states, and the test for a state's compliance with the requirements of due process in this area are similar."

The Zee Toys court conceded that Petitioners would prevail if the case were to be decided on equal protection grounds. (85 Cal. App. 3d at 777.) The Fleisher court, although not discussing equal protection, relied upon Zee Toys. Both courts ignored the admonition of the Court in Washington Revenue Dept. v. Stevedoring Association, supra, at 748:

"All tax burdens do not inpermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity."

When the Court speaks of balancing and the balance tipping, it presupposes a weighing of the various interests at stake. The court is called upon to weigh and determine the effect of the tax upon foreign or interstate commerce and intrastate commerce and to determine if the state's tax unduly or unfairly burdens or impedes either type of commerce.

The basic purpose of the Commerce Clause is to insure that no individual state attempts to isolate itself economically from the other states in such a fashion as to favor local interests or intrastate business. Neither the trial court nor the Court of Appeals found that the tax upon interstate commerce in California discriminated against interstate commerce by providing a direct commercial advantage to local business. On the contrary, the court merely speculated that there may be discrimination against an interstates business by giving an advantage to foreign commerce.

The Commerce Clause prevents discrimination against foreign commerce, interstate commerce, or trade with the Indian Nations in such a way that benefits local or intrastate business of a similar nature. It does not address itself to the question as to whether a state may make a

rational distinction between foreign commerce and interstate commerce and treat them differently as long as each is treated fairly in relationship to the state's own area of power, i.e., intrastate commerce. The effect of this Court's ruling in Japan Lines is to create such a distinction. California may tax cargo containers owned by state or U.S. residents, but not those owned by a foreign national.

Congress has not acted to dictate total equality of treatment between foreign commerce and interstate commerce by the states. In Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), this Court held that the Commerce Clause gave Congress power to require all states to adhere to uniform rules for division of income, and since they had not done so, the Court would not require such policy, stating:

> "It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all states to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution had committed such policy decisions."

II

RESPONDENTS COUNTY OF LOS ANGELES AND CITY OF LOS ANGELES HAVE NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 225

In federal courts municipal corporations have regularly been denied standing to attack state legislation as violative of the federal Constitution, on the ground that they have no rights against the state of which they are a creature. E.g., Williams v. Baltimore, 289 U.S. 36, 40 (1933); Trenton v. New Jersey, 262 U.S. 182, 192 (1923); Pawhuska v. Pahhuska Oil Co., 250 U.S. 394, 399 (1919). See also, P. Bator, et al., Hart and Wechsler's, The Federal System (2d ed. 1973) at 182; 13 C. Wright, et al., Federal Practice and Procedure, Section 3531, at 234. The Court of Appeal did not consider or apply this fundamental rule of standing in either Zee Toys or the instant decision.

This Court in Williams v. Mayor & City Council of Baltimore, supra, at 40, stated:

> "A municipal corporatation, created by a state for the better ordering of government, has no privileges or immunities under the federal Constitution which it may evoke in opposition to the will of its creator."

The Williams v. Mayor case presented a situation virtually identical to the one presently before this Court. The State Legislature had granted a tax exemption to certain property within the State. Two cities which were deprived of tax revenue by the exemption attempted to collect the taxes from the receiver in charge of the exempt property, claiming the exemption was unconstitutional. This Court held that a subdivision of a state did not have standing to attack enactments of its State Legislature under the Federal Constitution.

In City of New York v. Richardson, 473 F.2d 923 (1973) at 929, the Court of Appeal held:

> "The city and county plaintiffs' claims against the state defendant were also properly dismissed. Political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."

This Court in Data Processing Service v. Camp, 397 U.S. 150, at 153, stated:

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."

Respondents in this action are governmental subdivisions of the State of California who are

asserting Commerce Clause protection for themselves as against the state legislature of the state in which they are located. No reading of the Commerce Clause can be construed so as to conclude that the City and County of Los Angeles are within the zone of interest to be protected by the Commerce Clause.

A. The Court of Appeal Has Incorrectly Concluded That the Board of Supervisors Have Standing, Even Though Not Parties.

The Court of Appeal in the instant case rejected the standing question by merely stating that the appellants have a personal stake in the outcome, citing Baker v. Carr, 369 U.S. 186, 204 (1962). Zee Toys discussed the standing issue at some length, and concluded that there was standing relying primarily on City of New York v. Richardson, supra, and Board of Education v. Allen, 392 U.S. 236 (1968). Neither of these cases are directly on point. In Board of Education v. Allen, the Court in a footnote stated:

> "Appellees do not challenge the standing of appellants to press their claim in this Court. Appellants have taken the oath to support the United States Constitution. . . . There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation. Baker v. Carr . . . ." (392 U.S. at 236, n. 5.)

This footnote in Board of Education v. Allen was dicta, which was later picked up in City of New York v. Richardson, which, without discussion, stated:

> "With respect to standing those plaintiffs who sued in their official capacities may assert constitutional claims against the state under the rule announced in Board of Education v. Allen. . . ." (473 F.2d at 933.)

However, this statement was also dicta, as the Court went on to state:

> "Since it is clear that the District Court would have had jurisdiction over this case had these plaintiffs invoked the provisions of 42 U.S.C. §1983 and its jurisdictional mate, 28 U.S.C. §1343, we believe it would be wise to allow an amendment of the complaint alleging these sections as a jurisdictional basis." Ibid.

The standing issue in both Board of Education v. Allen and City of New York v. Richardson are dicta. In Richardson, the plaintiffs were suing under the civil rights act, and Allen involved civil rights allegations. In those instances the the individual government employees may be subject to the potential remedies on an individual basis. No such threat exists when you have collection of taxes. In Knoff v. San Francisco, 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 (1969), the court held that discrimination could only be raised

by the affected taxpayer, stating:

> "If the standard was wrong in the case of any affected taxpayer [because of discriminatory treatment] only that taxpayer can complain: the City and County of San Francisco cannot, the board of supervisors and the board of equalization cannot, the assessor cannot." Id. at 205.

The Fleisher court and the Zee court cavalierly announced that there is a personal stake in the matter, since the individual members of the Board of Supervisors have taken oaths to uphold the law. In fact the respondents in the instant case are local subdivisions of the State of California, they are the only parties to the lawsuit raising the commerce clause issue. They are not within the zone of interest to be protected by the Commerce Clause. 6/

6/ The following hypothesis is set forth by way of example: Assume that instead of the Boston Stock Exchange having brought suit, the taxing officials of the State of New York gratuitously determined to impose a higher tax on the privileged group, i.e., the taxing officials levied the higher rate on nonresidents that had made a sale on the New York Stock Exchange, contending that it was an unconstitutional violation of the Commerce Clause to give them a lower rate. The individuals taxed brought suit for refund. Clearly, the taxing authority would have an "interest" in imposing the higher rate, and would also have a

(continued on p. 24)

Every public official is charged with the duty of upholding the law, and to that extent has a "personal stake" in the outcome of any litigation, be it a civil rights litigation, a tort action, or tax litigation. However, to hold such indirect right creates jurisdiction would be an emasculation of the standing issue; there would be no tax litigation in which the subdivisions of the state would not have standing.

B. Respondents Are Not Within the Class to Be Protected By the Commerce Clause.

In Zee Toys the court rejected Community Television of Southern California v. County of Los Angeles, 44 Cal. App. 3d 990, 119 Cal. Rptr. 276 (1975); and Appeal of Martin, supra, arguing that they involved equal protection clauses and not the Commerce Clause. It is submitted that both Community Television and Appeal of Martin involved ad valorem property taxes and are directly on point.

6/ (continued from previous page)

"duty to uphold the law." They would not, however, be in the class of persons intended to be protected by the Commerce Clause. The correct position of the courts in such litigation should be that the taxing officials have no standing to raise the constitutional questions. Such questions would have to be raised, as they were, by an out-of-state stock exchange that was "discriminated against" or by an individual taxpayer that had levied upon him the higher rate because of his purchase on an out-of-state stock exchange.

The courts' distinction is without merit. The purpose of the standing issue is twofold, first to insure that a party with a real stake in the constitutional deprivations is the litigant; and second, that a subdivision of the state should not attack its creator.

The analysis by the Court of Appeal misses a fundamental point. It is not enough that a litigant have "a personal stake in the outcome" of the litigation to have standing. As Justice Douglas explained in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970), whenever the issue of standing is raised, "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." The question of standing requires a second inquiry as to "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. at 153.

In the present case, the County of Los Angeles and the City of Los Angeles experienced injury in fact because the tax exemption decreases local property tax revenues. The Commerce Clause of the United States Constitution was not, however, intended to protect them against such injury. The purpose of the Commerce Clause was to see that States did not protect local commerce from out-of-state competition. This Court has often declared that the Commerce Clause was intended to secure free trade among the United States. See, e.g., Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389,

395 (1952); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538-39 (1949). Indeed, this intent appears to have been the framers' purpose. Alexander Hamilton wrote, "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at ho me, but for exportation to foreign markets." The Federalist, No. 11, at 52 (Cooke ed. 1961).

In essence, then, the Commerce Clause is intended to protect interstate commerce from local discrimination. The County of Los Angeles and the City of Los Angeles do not engage in interstate commerce and are not within the "zone of interests" protected by the Commerce Clause. At best, these defendants are not asserting their own rights, but are attempting to achieve third party standing by raising the rights of companies engaged in interestate commerce. In order to obtain third party standing, the defendants must show that those third parties are powerless to assert their constitutional rights themselves.

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OCTOBER TERM, 1980

No. 79-700

WALTER FLEISHER COMPANY, INC., a corporation, *Petitioner,*

vs.

COUNTY OF LOS ANGELES, et. al., *Respondents.*

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF FOR COMMITTEE ON UNITARY TAX AS AMICUS CURIAE

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BRIEF FOR COMMITTEE ON UNITARY TAX AS AMICUS CURIAE

INTEREST OF AMICUS

The Committee on Unitary Tax hereby respectfully files this Amicus Curiae Brief in support of Petitioner Walter Fleisher Company, Inc. The consents of the attorneys for Petitioner and for Respondent are attached hereto as Appendices "A" and "B".

Amicus Curiae is a California nonprofit corporation comprised of members concerned with the state taxation of international business. Members include corporations organized under the laws of various states of the United States, corporations organized under the laws of other nations, and individuals.

Amicus Curiae has devoted its principal attention to support of A.B. 525, a bill pending in the California Legislature, which would prohibit the application of combined reporting to foreign operations of foreign based taxpayers. A copy of this proposed legislation, as amended in the California Senate on May 22, 1980, is attached as Appendix "C." The California Franchise Tax Board, in administering the California Bank and Corporation Franchise (income) Tax, purports to tax only income derived in California by a corporation doing business in this state. In the case of a United States branch or subsidiary of a foreign (non-U.S.) corporation engaged in business in California, the Franchise Tax Board includes the foreign income of the foreign parent corporation (and of other foreign subsidiaries of the foreign parent) in income subject to apportionment in California when both the domestic and foreign business activities are deemed to constitute a unitary operation. Such inclusion has created grave administrative problems as well as distortions resulting from the combination of income determined under methods of accounting not used in the United States with income determined under California tax accounting rules. Further distortion results from the effects on earnings and apportionment data of changes in the foreign exchange rates. Extensive testimony has been presented which indicates that burdens of this apportionment method fall more heavily on foreign taxpayers than on domestic taxpayers.

Amicus Curiae is vitally interested in the impact of this litigation on international trade. Amicus Curiae is particularly concerned about this case and the earlier case of *Zee Toys, Inc. v. County of Los Angeles*, 85 Cal.App.3d 763, 149 Cal.Rptr. 750 (1978), cert. granted *sub nom. Sears, Roebuck & Co. v. County of Los Angeles*, October Term,

1978, 78-1577, because staff of the California Franchise Tax Board testified in hearings before the Assembly Revenue and Taxation Committee on November 13, 1979, that A.B. 525 is probably unconstitutional on the basis of *Zee Toys, Inc. v. County of Los Angeles.*[1]

ARGUMENT

The California Court of Appeal held California Revenue and Taxation Code Section 225 unconstitutional as a prohibited discrimination under the Commerce Clause (Art. I, section 8, clause 3). Section 225 exempted from the California property tax, a general *ad valorem* property tax, certain personal property manufactured (i) outside the state and brought into the state for transshipment out of the United States, or (ii) outside the United States and brought into the state for transshipment out of the state, for sale in the ordinary course of business. The court concluded that the exemption, granted only to transshipped goods originating in or destined for foreign commerce, was an unconstitutional discrimination against transshipped goods originating in and destined for interstate commerce, and any such discrimination was a direct interference with

1. Mr. Benjamin Miller, Counsel for the Franchise Tax Board, stated:

> "The California Appellate Court invalidated a state statute which exempted certain products shipped in foreign commerce from property taxation. The court held that the statute unconstitutionally discriminated in favor of foreign commerce, vis-a-vis interstate commerce. The court's reasoning might invalidate any efforts by the Legislature to place limitations on the application of the unitary concept based upon the geographic location of the operations."
>
> . . .
>
> "Based upon the court's holding [in Zee Toys], any attempt to limit the application of the unitary method, with respect to foreign-based businesses, would probably be constitutionally invalid."

the power of Congress to regulate both foreign and interstate commerce. The court based its decision on an earlier holding of the California Court of Appeal in *Zee Toys, Inc. v. County of Los Angeles*, 85 Cal.App.3d 763 (1978), presently on appear to this Court *sub nom. Sears, Roebuck and Co. v. County of Los Angeles*, October Term 1978, 78-1577 (hereafter referred to as the "companion case") and cited with approval that court's conclusion that a showing of burden upon commerce was not necessary.

This *per se* approach is inconsistent with this Court's recent holding in *Japan Line, Ltd. v. County of Los Angeles*, ... U.S. ....., 60 L.Ed. 2d 336 (1979), and the decisions of this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *Washington Revenue Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978), and *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

A. The California Court Uses an Improper Analysis of the Commerce Clause.

This Court in its recent line of decisions interpreting the Commerce Clause has rejected ". . . a focus on . . . formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at p. 288.

The reasoning of the California court in this case and the companion case appears to be a return to that rejected formalism. If the California court means by its analysis that any exemption granted in the area of foreign commerce and not in interstate commerce is *per se* discriminatory or that any differing treatment between interstate and foreign commerce is an impermissible regulation of commerce in violation of the exclusive power of Congress to regulate, Amicus fears that a court cannot reach the paramount

inquiry—the practical effect of legislation on commerce. *Mobil Oil Corp. v. Commissioner of Taxes*, ... U.S. ....., 63 L.Ed.2d 510 (1980).

The California court never reaches the question of the "practical" effect of the tax. Part of the reason is that the California court treats the exemption as if it were the tax.[2] Since any exemption is, by its nature, intended to differentiate, any exemption when subjected to a "per se" analysis as if it were the tax is likely to be found discriminatory.[3] That is why this Court in the past has generally treated tax exemptions as classification questions under the Equal Protection Clause. See, *e.g.*, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

The fallacy of the California court's reasoning is apparent when examined in the light of *Japan Line, Ltd. v. County of Los Angeles*. The California court would hold *per se* discriminatory an exemption from the California *ad valorem* property tax of foreign-owned instrumentalities of commerce in international trade since domestic-owned instrumentalities in interstate commerce did not receive a similar exemption. The practical effect of this Court's decision in *Japan Line, Ltd. v. County of Los Angeles* is to mandate such an exemption, yet the California court, under the reasoning of this case, could never uphold an exemption: it could never progress beyond the basic fact

2. The California court rejected the contention that there was any difference between a discriminatory tax and a discriminatory exemption. *Walter Fleisher Company, Inc. v. County of Los Angeles*, Appendix B, Petition for Writ of Certiorari, at pp. B-4—B-5.

3. It should be noted that the exemption does not discriminate against interstate commerce on its face. It simply exempts transshipped goods whose origin or destination is foreign. All other goods, including any others in transshipment (which by necessity would be those in interstate commerce), and all goods originating or coming to rest in California are subject to the tax.

of different, and hence discriminatory, treatment. The approach employed by the California court should not be allowed to stand since it precludes examination of the constitutional validity of exemptions.

The proper analysis of the exemption is an analysis of the tax with a consideration of the exemption's effect on the operation of the tax. This is not empty formalism since it places the burden of proof on the party claiming discrimination[4] and preserves the right of the state to set forth the balancing state policies and rebut the claim of discrimination. See *Hughes v. Oklahoma*, ... U.S. ....., 60 L.Ed.2d 250 (1979); *Lewis v. BT Investment Managers, Inc.*, ... U.S. ....., 48 U.S. L.W. 4638 (1980).

Even if there were no discrimination against interstate commerce, the California court would still hold that the exemption was an unconstitutional regulation of interstate and foreign commerce on the basis that differentiation between these areas is exclusively within the province of Congress. This Court now seldom applies the "zone of exclusivity" approach in its analysis of the Commerce Clause, particularly where the challenged regulation is a state tax. This Court's usual review is illustrated by such cases as *Moorman Mfg. Co. v. Bair*, 437 U.S. at pp. 278-280; *Mobil Oil Corp. v. Commissioner of Taxes*, 63 L.Ed.2d at p. 528.

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4. There is little or no evidence of any burden in the record. This is because the party allegedly aggrieved by the discriminatory exemption, a shipper which transships its goods in interstate commerce and on which any burden would rest, is not before the Court. Instead the party contending that the statute is unconstitutional is a subdivision of the state seeking to protect its tax base by an elimination of the exemption. This subdivision, the County of Los Angeles, opposes the decision made by the policy body of the state, the California Legislature, with respect to the shape and limits of the state's property tax. Because of this there has been no real exploration of the practical burden of the tax since there is no one before this Court who is concerned about burdens.

Moreover, this Court in *Japan Line, Ltd. v. County of Los Angeles* has eschewed such an analysis. Any state must now exempt such foreign-owned instrumentalities, not because any tax intrudes on some area of Federal exclusivity, but because the tax, *in operation*, jeopardizes the purposes of the Foreign Commerce Clause. Again, had that case come to the California court in the posture of an exemption of such foreign-owned instrumentalities from the California *ad valorem* property tax, the California court would have struck down the exemption as being an impermissible attempt to regulate between interstate and foreign commerce.

Michelin Tire Co. v. Wages, 423 U.S. 276 (1976) and *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) do not support the approach of the California court.

The court relies on *Michelin* for the proposition that an exemption of foreign commerce constituted a regulation of such commerce. The court cited as authority this Court's discussion of why nondiscriminatory taxes are permissible:

> "It [a nondiscriminatory tax] cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively *to encourage* or discourage any importation in a manner inconsistent with federal regulations." 423 U.S. at p. 286. (Emphasis added.)

Presumably the court reasoned that the exemption operated to encourage imports[5] and thus constituted an improper regulation even if it had no adverse effect on interstate or foreign commerce.

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5. It seems clear that the purpose of the California statute was not to encourage imports but rather to encourage importers to use California warehouses. Imports could come in to any of the other free port states including three surrounding California, namely Oregon, Nevada and Arizona, without paying property taxes. Imports would thus have no advantage in California which they would not have in the free port states.

As this Court pointed out in *Michelin*, the Framers of the Constitution committed the *sole* power to lay duties on imports to the federal government with no *concurrent* state power. 423 U.S. 276, 285. However, the Import-Export Clause differs from the Commerce Clause:

> "Although the parties dispute the meaning of the prohibition of 'Imposts or Duties on Imports or Exports,' they agree that it differs from the ban the Commerce Clause erects against burdens and taxation on interstate commerce. Brief for Petitioner, 32-33; Brief for Respondents, 9-10; T of Oral Arg 13-22. The Court has noted before that the Import-Export Clause states an absolute ban, whereas the Commerce Clause merely grants power to Congress."

Washington Revenue Dept. v. Stevedoring Assn., 435 U.S. at p. 751. See also Footnote 14, *Japan Line, Ltd. v. County of Los Angeles.*

The California court's reliance on *Boston Stock Exchange v. State Tax Commission* is equally misplaced. The California court cites this case as holding that discrimination between various types of interstate commerce is *per se* improper. It then analogizes this holding to discrimination between foreign and interstate commerce: both types of discrimination are unconstitutional and impermissible in the eyes of the California court because both fall *within areas* which only Congress may regulate. However, this Court in *Boston Stock Exchange v. State Tax Commission* was looking at the *purpose and effect* of the discrimination between two types of interstate commerce, namely ". . . to favor local commercial interests over out-of-state businesses. . . ." 429 U.S. at 335. The *Boston Stock Exchange* case is a classic Commerce Clause analysis of discrimination *in operation*. The California court's reading of this case

harks back to the old "zone of free trade" approach enunciated by such cases as *Freeman v. Hewit*, 329 U.S. 249 (1946) and overruled by this Court in *Complete Auto Transit, Inc. v. Brady*.

Finally the California court in the companion case rejects any showing of state interest or policy on the basis that this is not relevant under the Commerce Clause. Even in cases of discrimination on the face of the statute against interstate commerce, this Court has extensively explored state policies (see, *e.g., Lewis v. BT Investment Managers, Inc.*) in an effort to balance the competing interests of the state against the policies of the Commerce Clause.

Whatever the final outcome of this case, Amicus is particularly concerned that this Court reject the foregoing approach of the California court in reaching its conclusions. Amicus has stated the reasons for its concern in its statement of interest: pending legislation on the effect of the California Franchise (income) on foreign operations.[6]

Although this Court may have intimated in *Mobil Oil Corp. v. Commissioner of Taxes* that its analysis of property taxes in *Japan Line, Ltd. v. County of Los Angeles* might have no immediate application to an income tax, this Court has been consistent in its overall approach to Commerce Clause analysis: *Complete Auto Transit, Inc. v. Brady* (privilege tax); *Washington Revenue Dept. v. Stevedoring*

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6. The analysis used by the California court is being cited by staff of the Franchise Tax Board as precluding any showing that the legislation in which Amicus is interested is constitutionally permissible. (see reference at p. .... of this brief) Amicus does not believe that this is even a proper interpretation of the holding of the California court, but Amicus wishes to preclude any such arguments which would block a full review of the validity of any exemption in a proper case. A restoration of neutrality to a taxing system has been considered a proper objective. *Boston Stock Exchange v. State Tax Commission.*

Assn. (occupation tax); *Moorman Mfg. Co. v. Bair* (income tax); *Japan Line, Ltd. v. County of Los Angeles* (property tax). Accordingly, Amicus would urge this Court in any analysis to require a consideration of the practical effect of any tax (or any tax operating with an exemption) and to reject any *per se* approach which requires no showing of impermissible burden and no opportunity to balance competing interests, whether of the state or of national or international policy.

B. Federal Tariff Legislation Does Not Preempt the Statute.

Federal legislation will, of course, preempt state activity if such activity is not consonant with such legislation. The California court erroneously concluded that the exemption was an interference with the tariff laws of the United States. However, imports shipped through free port states have the same competitive advantage, which the California court saw stemming from this exemption, over goods originating in other states which are shipped through a state which taxes all goods equally. Thus, if there is interference, it derives from the lack of uniformity among the states with respect to their taxing policies. True preemption would seem to permit no taxation or require taxation only at uniform rates. However, this Court has been loath to find a necessity for uniformity in state taxing systems or any preemption, absent a clear direction from Congress. *Moorman Mfg. Co. v. Bair; Mobil Oil Corp. v. Commissioner of Taxes.*

C. Section 225 Does Not Create Discrimination Prohibited by the Commerce Clause.

In measuring a statute against the strictures of the Commerce Clause, this Court now looks to the practical effect of the statute to determine whether it is "applied to an

activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at p. 279.

1. THE STATUTE DOES NOT DISCRIMINATE ON ITS FACE AGAINST INTERSTATE COMMERCE.

The initial question for this Court is whether the statute in question discriminates against or burdens interstate commerce. Although the test is often phrased in the alternative, Amicus knows of no case where impermissible discrimination does not create a burden. The statute which creates the impermissible burden must be the taxing statute since an exemption cannot create a burden. The California ad valorem property tax is nondiscriminatory. *Japan Line, Ltd. v. County of Los Angeles.*

The exemption itself does not make a distinction on the basis of residency or nonresidency. The exemption applies to certain goods in transshipment. There is another exemption, not before this Court, which applies to goods in transit, presumably those goods within the constitutional immunity accorded to foreign and interstate commerce. All other goods in the state at the lien date are not exempt. Goods which originate in or come to rest in the state no matter what their origins are subject to the tax so there is no favoring of local business. Accordingly, the combination of the tax and exemption does not discriminate against interstate commerce on its face.

Nor is the purpose of the exemption an improper purpose under the Commerce Clause. All parties seem to agree that the purpose of this statute was to preserve the local warehousing business, and the statute does not seek to preserve this business by discriminating against out-of-state ware-

housing businesses. Economic purposes or competitive purposes are not *per se* suspect. *Boston Stock Exchange v. State Tax Commission.*

2. NEITHER THE EXEMPTION NOR THE TAX INCLUDING THE EXEMPTION IMPERMISSIBLY BURDENS INTERSTATE COMMERCE.

A statute may be discriminatory in operation even if it is not discriminatory on its face.

Ordinarily, the party claiming discrimination has the burden of proof to show the existence of such discrimination. *Hughes v. Oklahoma.* Discrimination is not shown merely by different treatment, but rather is indicated by a burden created by the statute in question on interstate commerce. The burden must not be incidental. *Boston Stock Exchange v. Tax Commission; Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). The type of evidence which this Court should have available to it is best illustrated by *Raymond Motor Transportation, Inc. v. Rice* in which the petitioners demonstrated both economic burdens and the absence of safety implications in the regulations adopted by the State of Wisconsin with respect to the length of trucks passing through the state. Because the California court believed there was no necessity to show a burden on interstate commerce, the record is substantially devoid of any evidence on this point.

Evidence of an impermissible burden can also arise if the tax changes otherwise neutral economic behavior. This Court in *Boston Stock Exchange* found that because of other localizing tax incidents the seller could not escape tax liability by selling out of state but could reduce his liability by selling in state. Hence the decision of where to sell became weighted in favor of selling in New York. Under the California statute, a shipper can easily escape the California tax by not shipping through California. There is no

additional localizing incident as existed in the *Boston Stock Exchange* case which would foreclose this decision. Because of the history of this exemption, which was an attempt to preserve practices which existed until the decisions of the California court in *Volkswagen Pacific Inc. v. City of Los Angeles*, 7 Cal.3d 48 (1972) and this Court in *Michelin Tire Co. v. Wages*, shippers in interstate commerce did not face a situation substantially different after the enactment of the exemption than they had before. Economic decisions to take into account the burden of the tax had been made many years before so that the pattern of commerce in California was not disrupted or changed by this exemption. In short, there was no change of direction of commerce as occurred in *Boston Stock Exchange v. State Tax Commission*.

Finally, the tax continues to fall on local businesses. Accordingly, the usual presumption of validity should be afforded the state because the state's political processes remain as a check upon unwarranted burdens. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S., Footnote 18 at p. 444.

3. THE STATE HAS LEGITIMATE POLICY INTERESTS WHICH BALANCE ANY COMPETING POLICIES.

Because of the posture of this case before the Court, namely that neither the person burdened nor the state which determined taxing policies is a party hereto, and because the California court analyzed only the exemption and not the tax, there has been no full development of the state policies vindicating the taxing policy. The state has a right to require various forms of commerce to pay their fair shares, and it is ordinarily within the province of the state to determine the nature of that fair share so long as determination is not arbitrary.

Similarly, the state has a legitimate interest in encouraging commerce and in placing different forms of commerce on an equal footing by taxes, exemptions, and other forms of regulation. See *Boston Stock Exchange v. State Tax Commission.*

Not every tax is an impermissible burden on commerce, and not every tax has an anticompetitive effect. *Washington Revenue Dept.; Michelin Tire Co. v. Wages.* All taxing systems and other state regulations contain a network of deductions, distinctions and exemptions with the understanding that these may fall more heavily on some than on others. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The granting of an exemption is a far cry from the extensive burden on interstate commerce feared by the Framers of the Constitution. As this Court has said in determining that a bounty granted on certain abandoned vehicles was a burden on interstate commerce simply because it was limited to vehicles registered in the state: "... the Commerce Clause (is) primarily intended (at least when Congress has not spoken) to inhibit the several States power to create restrictions on the free flow of goods within the national market, rather than provide the basis for questioning a State's right to experiment with different incentives to business." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (concurring opinion.)

Indeed, this Court is loath to set aside state regulation unless a severe impediment to the Commerce Clause exists. In *Exxon Corp. v. Governor of Maryland*, it was stated: "This Court has only rarely held that the Commerce Clause itself pre-empts an entire field of state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods." 437 U.S. 117 at p. 128.

Where the purpose of the tax is not suspect, where

the burden is simply a tax that was paid in the past and continues to be paid vis-a-vis goods on which the tax was not paid in the past, and where the record is devoid of any other anticompetitive effects or forbidden purposes, the California property tax operating with this exemption does not create a prohibited discrimination against interstate commerce.

CONCLUSION

The California court in its decision restored the meaningless formalism rejected by this Court in *Complete Auto Transit, Inc. v. Brady*. By so doing, it has eliminated any burden of proof on the party contending that the statute discriminates and also eliminated the opportunity for the Court to balance the competing constitutional policies and the state's interests. This Court has identified differing policies animating the Commerce Clause, Foreign Commerce Clause, and the Import-Export Clause, but the approach of the California court would foreclose any consideration of such policies which may not only permit, but require, differing treatment among the different forms of commerce. Amicus urges this Court to overrule the California court.

Respectfully submitted,

JOANNE M. GARVEY
MICHAEL WELLS
ROY E. CRAWFORD

Attorneys for Amicus Curiae

Appendix A

[Letterhead]
May 20, 1980

Ms. Joanne Garvey
Jordan, Keeler & Seligman
Alcoa Building
Suite 1400
1 Maritime Plaza
San Francisco, California 94111

Re: Walter Fleisher Company, Petitioner vs. County of Los Angeles, Respondent No. 79-700

Dear Ms. Garvey:

This will confirm that we have no objection and consent to your filing an Amicus Curiae Brief on behalf of Walter Fleisher Company.

Yours truly,

EVANS, MANPEARL & HARTER

By Gerald T. Manpearl

GTM/ns

Appendix B

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 Hall of Administration
Los Angeles, California 90012

May 21, 1980

(213) 974-1833

Ms. Joanne Garvey
Jordan, Keeler & Seligman
Alcoa Building
1 Maritime Plaza, Suite 1400
San Francisco, CA 94111

RE: Walter Fleisher Company, Petitioner v. County of Los Angeles, Respondent No. 79-700

Dear Ms. Garvey:

This will confirm our agreement with Gerald T. Manpearl to the effect that we have no objection and therefore consent to you filing an Amicus Curiae Brief on behalf of Walter Fleisher Company.

Very truly yours,
JOHN H. LARSON, County Counsel

By
Philip H. Hiekok
Deputy County Counsel

cc: Jerry Manpearl
PHH:jw

Appendix C

AMENDED IN SENATE MAY 22, 1980
AMENDED IN SENATE MAY 1, 1980
AMENDED IN SENATE MARCH 27, 1980
AMENDED IN ASSEMBLY JANUARY 28, 1980
AMENDED IN ASSEMBLY JANUARY 21, 1980
AMENDED IN ASSEMBLY SEPTEMBER 14, 1979
AMENDED IN ASSEMBLY MAY 16, 1979

CALIFORNIA LEGISLATURE—1979-80 REGULAR SESSION

ASSEMBLY BILL No. 525

Introduced by Assemblymen Hughes, Kapiloff, Imbrecht, Moore, Naylor, and Dennis Brown
(Principal coauthors: Assemblymen Mori and Deddeh)

February 12, 1979

REFERRED TO COMMITTEE ON REVENUE AND TAXATION

An act to add Section 25101.9 to the Revenue and Taxation Code, relating to taxation, to take effect immediately, tax levy.

LEGISLATIVE COUNSEL'S DIGEST

AB 525, as amended, Hughes (Rev. & Tax.). Bank and Corporation Tax Law: unitary business.

Under the existing Bank and Corporation Tax Law, the income of a unitary business which is subject to taxation is determined by means of an apportionment formula based on income derived from or attributable to sources both within and without the state.

This bill would provide that in determining the income subject to tax of a bank, corporation, or other entity, there shall not be taken into account the income and apportionment factors of any other bank, corporation or other entity, if such bank, corporation, or other entity is (1) created or organized under the laws of a foreign country, and (2) not owned and controlled by a United States corporation or residents of the United States.

Corporations engaged in the steel business and a business owning agricultural land in this state are excepted from the provisions of the bill.

This bill would take effect immediately as a tax levy.

This bill would provide that if any provision of this act is held invalid, such invalidity shall not affect other provisions of the act which can be given effect without the invalid provision.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds that generally accepted accounting methods in general use by foreign based taxpayers are materially different from accounting methods used by United States based taxpayers, and income statements prepared under foreign accounting standards are not readily converted to income statements based on the California Bank and Corporation Tax Law. The Legislature further finds that many unresolved problems have arisen in accounting for changes in foreign exchange rates, both in determination of income and in constructing apportionment data of foreign based taxpayers, on a basis consistent with that used to determine income earned in California by United States taxpayers. The Legislature further finds that the cost burden of converting income statements of foreign based taxpayers to in-

come statements more comparable to those of United States based taxpayers is often substantially greater than any resulting tax on income considered to be earned in California. The Legislature further finds that the inclusion of foreign income in determining the tax liability of foreign economic interests wishing to invest in California has frequently resulted in unfair taxation of foreign based taxpayers and consequently acted as an impairment to investment and hindered the creation of new opportunities for employment and the diversification of the economic base of this state.

SEC. 2. Section 25101.9 is added to the Revenue and Taxation Code, to read:

25101.9. (a) Notwithstanding any other provision of this chapter (except as provided in subdivision (g)), in determining the income subject to tax of any bank, corporation, or other entity liable to report under this part, there shall not be taken into account the income or apportionment factors of any other bank, corporation, or other entity if such other bank, corporation, or other entity:

(1) Is created or organized under the laws of a foreign country; and

(2) Is not owned or controlled by a United States corporation or residents of the United States.

(b) *For purposes of this section, the activities conducted within or directed from the United States by any bank, corporation, or other entity meeting the conditions set forth under paragraphs (1) and (2) of subdivision (a) shall be deemed to be conducted by a separate bank, corporation, or other entity which does not meet such conditions, and, except as provided in subdivision (a), the income and apportionment factors of any such bank, corporation, or other entity shall be determined upon the basis of the books of account maintained by such bank or corporation or other entity with respect to the activities conducted within or directed from the United States and the income and*

apportionment factors with respect to such activities shall be taken into account in the manner authorized by this chapter.

(c) The Franchise Tax Board shall audit, at least once every four years, the separate accounting and arm's length transactions of any bank, corporation, or other entity determining income pursuant to this section.

(d) This section shall not apply in determining the income allocable to this state from a unitary business whose principal activity is the steel business, or a business owning agricultural land in this state. For the purpose of this subdivision, the term "steel business" means the manufacture or sale of products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated, or otherwise similarly processed, or processed by a combination of two or more of such operations, from steel made by the open hearth, basic oxygen, electric furnace, Bessemer, or other steelmaking process. For purposes of this section, "agricultural land" is land used for the production of agricultural commodities for commercial purposes.

(e) For purposes of this section, direct or indirect ownership or control of more than 50 percent of the voting stock shall constitute ownership or control.

(f) The following definitions shall apply for the purposes of this section:

(1) The term "residents of the United States" means residents of the United States, its territories, or possessions, or the Commonwealth of Puerto Rico.

(2) The term "United States corporation" means a bank, corporation, or other entity organized under the laws of the United States, its political subdivisions, its territories, or possessions, or the Commonwealth of Puerto Rico.

(g) Nothing in this section shall preclude the Franchise Tax Board from distributing apportioning, or allocating gross income, deductions, credits, or allowances between or among organizations, trades, or businesses, if it determines that it is necessary to do so in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses.

(h) *In view of pending litigation concerning the question of whether a corporation liable to report under the Bank and Corporation Tax Law must take into account the income and apportionment factors of other corporations operating in a foreign country, it is not intended that any inference be drawn from the enactment of this act in any litigation concerning such question.*

SEC. 3. This act shall not be effective for income years beginning on or after January 1, 1980, if an initiative constitutional amendment to limit state income tax rates to one-half, which is on the June 1980, ballot, is approved by the voters.

SEC. 4. The Legislative Analyst shall report to the Legislature during the 1988 legislative session on the impact of this act.

SEC. 5. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect. However, the provisions of this act shall apply in the computation of taxes for income years beginning on or after January 1, 1980.

SEC. 6. *If any provision of this act or the application thereof to any person or circumstance is held invalid or unconstitutional because it favors foreign-based corporate entities over domestic-based corporate entities or for any other reason, then this act shall be invalid in its entirety and shall be repealed.*

No. 79-700

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

WALTER FLEISHER CO., INC.,

Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Respondents.

RESPONDENTS' BRIEF

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. 79-700

WALTER FLEISHER CO., INC.,

Petitioner,

vs.

COUNTY OF LOS ANGELES and
CITY OF LOS ANGELES,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF FOR THE RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

---

1. Whether a state statute which concurrently affects both foreign and interstate commerce is violative of the Commerce Clause

in that:

a. The statute discriminates against interstate commerce and in favor of foreign commerce or,

b. the statute intrudes into the field of foreign commerce which is exclusively regulated by Congress.

2. Whether a political subdivision of a state may raise the constitutionality of a state statute in defending a lawsuit challenging the action taken by its officials.

SUMMARY OF ARGUMENT

1. A state statute which does not accord the tax benefits to interstate commerce which are accorded to foreign commerce imposes a discriminatory tax burden upon interstate commerce in violation of the Commerce Clause.

2. If alternative, nondiscriminatory means are available to achieve a local economic purpose, a statute which discriminates against interstate commerce will be struck down under the Commerce Clause.

3. A state statute which accords foreign commerce tax benefits while withholding such benefits from interstate commerce, creates an impermissible burden on interstate commerce prohibited by the Commerce Clause.

4. Congress has exclusive and plenary control over foreign commerce to the complete exclusion of the states.

5. A state statute which encourages foreign commerce by offering tax inducements to foreign businesses prevents the nation from speaking with one voice in the area of foreign trade.

6. Article III jurisdiction is conferred on this Court when a complainant (Petitioner) alleges injury in fact and that he is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

7. Political subdivisions are not required to satisfy traditional Article III standing requirements when they are defendants in a state court proceeding which challenges the acts of its officials in denying a tax exemption and refund.

8. By finding Respondents have prudential standing in this case, the Court will encourage public entities to protect the constitutional rights of its citizens while at the same time allow them to avoid otherwise automatic and potentially crippling damage awards.

ARGUMENT

I

A STATE STATUTE CANNOT FAVOR OR ENCOURAGE FOREIGN COMMERCE AT AT THE EXPENSE OF INTERSTATE COMMERCE

In this issue of first impression, the Court is called upon to decide whether a state taxing statute which concurrently affects both foreign and interstate commerce is violative of the Commerce Clause (Article I, §8, cl 3) because it accords foreign goods economic benefits not available to interstate goods. A collateral issue is whether the statute impermissibly intrudes into the area of foreign commerce which is exclusively regulated by Congress.

A. ANALYSIS UNDER THE COMMERCE CLAUSE

Regulation Of Interstate Commerce

In recent years, this Court has fashioned a fourfold test under which state statutes are to

be scrutinized when challenged under the Commerce Clause. In Complete Auto Transit v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L. Ed. 2d 326 (1977), this Court rejected the "per se unconstitutional" rule in dealing with a privilege-of-doing-business tax. In its stead, this Court will now look, not to the formal language of a tax statute, but rather to its practical effect and will sustain a tax against Commerce Clause challenge:

> "When the tax is applied to an activity with a substantial nexus with the taxing state, is apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." Complete Auto Transit v. Brady, supra, 430 U.S. 274, 279 (emphasis added)

A further refinement to this test was fashioned in 1979 in a situation dealing with an Oklahoma statute which prohibited the transportation or shipping out of the state minnows procured within the state's waters. Hughes v. State of Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). In discussing the discrimination aspect of the Complete Auto Transport test this Court said:

> "Under the general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates

against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." Hughes, supra at 336.

And if such facial discrimination is found to exist, it by itself may be a fatal defect of the statute:

> "[R]egardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends' [Philadelphia v. New Jersey 437 U.S. 617, 626, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)], at a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes, supra at 337. [emphasis added]

In footnote 17 of the Hughes opinion (441 U.S. 337), a passage from Philadelphia v. New Jersey was cited which, as Respondents will show infra, is germane to this appeal:

> "[W]hatever [a state's] ultimate purpose, it may not be accomplished

by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." Philadelphia v. New Jersey, 437 U.S. at 626-627.

Thus, when analyzing a state taxing statute which affects interstate commerce, a court's first inquiry is along the lines set forth in Complete Auto Transport v. Brady, supra, 430 U.S. 274, 279. If discrimination against interstate commerce is apparent from the face of the statute, it may fall regardless of the purpose of the statute or the effect. Philadelphia v. New Jersey, supra, 437 U.S. 617, 626-627. In any event, if discrimination is found, the statute will be strictly scrutinized and will fall if there are alternative nondiscriminating means of achieving the desired goals. Hughes v. Oklahoma, supra, 441 U.S. 322, 337.

Regulation of Foreign Commerce

When analyzing a state statute which affects foreign commerce, the above series of inquiries must be made, but in addition, the court must look to see if the statute risks multiple taxation of the goods and whether the statute prevents the Federal government from exercising complete control over foreign commerce. Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434, 446, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979).

The basis for the multiple taxation aspect is that neither the Supreme Court nor the Nation can ensure full apportionment of taxes when one of the taxing entities is a foreign sovereign (Japan Lines, supra, 441 U.S. 447). The federal sovereign aspect is dictated by the need to have federal uniformity in areas where such uniformity is necessary. Id. at 448. "In international relations and with respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power." Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 59, 53 S.Ct. 509, 77 L.Ed. 1025 (1933).

While this Court has noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty, "[i]t has never been suggested that Congress' power to regulate foreign commerce could be so limited" Japan Lines, Ltd., supra at note 13 with cases cited.

Consistently, the Court has recognized the exclusive and plenary aspect of Congress' power to regulate foreign commerce:

> "It is essential attributes of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action [Citations]... The Congress may determine what articles may be imported into this

country and the terms upon which importation is permitted... If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, as the Congress may [Citations], no state by virtue of any interest of its own would be entitled to override the restriction. The principal of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce." Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 56-57, 53 S.Ct. 509, 510, 77 L. Ed. 1025 (1933).

And in Hines v. Davidowitz, 312 U.S. 52, 63, 61 S.Ct. 399, 89 L.Ed. 581(1941), this Court stated:

"Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

And directly in point to the Solicitor General's position as amicus in our companion case Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577, is Justice Stewart's concurring opinion in Zschernig v. Miller, 389 U.S. 429, 443, 88 S.Ct. 664,

19 L.Ed.2d 683 (1968):

> "The Solicitor General, as amicus curiae, says that the Government does not 'contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.' But that is not the point. We deal here with the basic allocation of power between the states and the nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several states."

When judging a state statute against Commerce Clause restrictions, a strict scrutiny test is required whenever the statute bespeaks of discrimination. It will not be per-se unconstitutional, but a compelling state interest must be shown to justify it and there must not be alternative means of achieving that interest which do not discriminate. Yet when the field of foreign commerce is involved, no state statute will survive scrutiny by this Court, regardless of its purpose, if it impairs the Nation's ability

to speak with one voice.

As shown in the following sections, §225 of California's Revenue & Taxation Code discriminates on its face against interstate commerce and seeks to regulate foreign commerce in a manner contrary to the National interest.

B. THE CALIFORNIA STATUTE

Section 225 of California's Revenue and Taxation Code states:

> §225. "Personal Property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property."

Breaking the statute down into its component parts indicates it applies to the import and export of goods manufactured or produced

outside of California. An exemption from California's ad valorem property tax is given such goods so long as they are not in manufacturing process or production within the state.

The discrimination readily apparent on the face of the statute lies within subsection (1) where the exemption is conditioned upon "transshipment out of the United States." Thus, interstate commerce coming into California is taxed unless it is further shipped out of the Country. Further shipment within the United States does not satisfy the condition. Foreign commerce, on the other hand, is entitled to the exemption if it is shipped elsewhere in the Nation. Thus an unequal tax burden is placed on interstate commerce.

The attempt to regulate foreign commerce is also apparent from the statute. An exemption from California's uniform ad valorem tax is granted to property manufactured or produced "outside of the United States." This is a direct attempt to encourage foreign business to come to California by offering economic inducements in the form of a rebate of the tariffs paid on such goods to the United States. Whether this statute significantly affects foreign commerce or not, it unquestionably affects it to some degree and is a regulation of foreign commerce prohibited by Article I Section 8 cl. 3 of the Constitution.

C. THE INVALIDITY OF THE STATUTE

Applying the current state of the law to Section 225 leads to the inescapable conclusion that the California Court of Appeals was correct in finding it unconstitutional under the Commerce Clause.

On its face, Section 225 discriminates against interstate commerce. Interstate commerce is afforded an exemption from California's ad valorem tax only if goods are exported from the Country. Foreign goods, however, are automatically exempted. Thus, novelty items brought from Japan to Los Angeles to be sent to Chicago are exempt from taxation. The same novelty items brought from Hawaii (conceivably in the same ship) to Los Angeles to be sent to Chicago (on the same truck) are not exempt from taxation and are taxed. This unequal tax treatment is discrimination.

Thus, the statute does not automatically pass the four pronged test of Complete Auto Transit, supra, 430 U.S. 274. Under Hughes v. Oklahoma, supra, 441 U.S. 322 and Philadelphia v. New Jersey, supra, 437 U.S. 617 further scrutiny of this discrimination is required. Philadelphia teaches that this discrimination may be fatal to the statute without any additional review "unless there is some reason apart from their origin, to treat [the interstate goods] differently." Id. at 626-627.

The Court of Appeal found the purpose of Section 225, as indicated by its legislative history, was to promote utilization of California ports and discourage removal of import business to states with a more favorable tax structure (Zee Toys, Inc. v. County of Los Angeles (1978) 85 Cal.App. 3d 763). This sole purpose was to foster and protect in-state businesses. An incentive was given to foreign companies to bring their goods through California ports for transshipment to the rest of the United States. The result of this local economic purpose was to impose upon interstate commerce an unequal tax burden in order to protect a domestic business (port trade). The discrimination resulting from this purpose is the evil warned of in Philadelphia v. New Jersey, supra, 437 U.S. 617. As the only reason for this discrimination is the origin of the interstate goods, Section 225 is fatally defective on its face and no review of the effect of the statute is necessary. A state's desire to avoid business flight to another state cannot be the basis for usurping Congress' commerce power. Boston Stock Exchange v. State Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

Even if the per se discrimination does not overturn Section 225, Hughes v. Oklahoma, supra, 441 U.S. 322 sounds its death knell. No party can honestly contend that Section 225 does not discriminate against interstate commerce. The issue is whether such discrimination is unconstitutional. Hughes, supra, indicates that a discriminatory statute having a legitimate

local purpose must fall if "alternative means could promote this local purpose as well without discriminating against interstate commerce." Id. at 441 U.S. 336.

As previously pointed out to this Court, California has recognized the invalidity of Section 225 and has cured it by exempting all business inventories from taxation (Section 219 Revenue and Taxation Code, Stats. 1979, chap. 1150, §7). Such action clearly accomplishes the legitimate local purpose of encouraging foreign business to use California ports while not imposing any additional tax burden on interstate commerce. Short of exempting all inventories, the Legislature could have exempted all commerce coming from out of state to be further transshipped. That alternative also would have eliminated the discrimination against interstate commerce.

As feasible alternative means existed to accomplish the local purpose and as such means would not have discriminated against interstate commerce, Hughes v. Oklahoma, supra, 441 U.S. 322 requires the invalidation of Section 225 without further analysis.

The Court of Appeal, relying on Zee Toys v. County of Los Angeles, 85 Cal. App. 3d 763 (1978), found Section 225 unconstitutional as it discriminated against interstate commerce. Respondents contend this was proper in light of the Hughes and Philadelphia decisions. However, should this Court look beyond the discrimination to the burden placed on interstate commerce,

sufficient facts exist in the record to show the burden was not incidental or de minimus but in fact was substantial. As being a substantial burden, the statute must fall as being violative of the Commerce Clause.

The uncontroverted declarations of Arthur Lew (A-58), Joseph W. Grant (A-60) and James Dexter Clark (A-56) when taken together with the Stipulated Set of Facts (A-34) and Walter Fleisher's declaration (A-14) present this Court with the following evidence which was before the Court of Appeal.

A substantial amount of sea-borne and land traffic flows into California from other points within the United States and is distributed throughout various regions of the United States (A-58; Lew Declaration). Inventories of a nature similar to Petitioner's remain in California prior to being transshipped for 3-1/2 months (A-60; Grant Declaration). Petitioner reported imported business inventory at a single location on March 1, 1976 to be $287,694 of which 74.2% was further shipped out of California (A-14; Fleisher Declaration). Over 30 lawsuits involving the validity of Section 225 are seeking refunds of more than $1,000,000 against the County of Los Angeles (A-56; Clark Declaration).

From the above facts the burden Section 225 places on interstate commerce can be derived simply by looking at the benefit importers of foreign goods seek to obtain. Well over $1,000,000 in actual tax refunds is at stake in

30 cases (over $30,000 per plaintiff for the 1976 tax year). One plaintiff (Sears) stands to benefit by over $280,000 for a single year should Section 225 be found valid (judgment rendered in favor of Sears by Trial Court: Appendix in Sears, Roebuck v. County of Los Angeles, No. 78-1577). United States businesses (whose interstate commerce represents a substantial portion of the flow of traffic into California) will not share in this benefit.

Respondents contend no additional evidence is necessary to show the burden Section 225 places on interstate commerce. Obviously a Philadelphia or Hawaii businessman faces an unequal tax burden if he is to compete with the Japanese importers. This is exactly the situation the Commerce Clause prohibits--a discriminatory tax which produces a substantial burden on interstate commerce. As such, Section 225 should be struck down.

In addition to Section 225 being invalid as discriminating against interstate commerce, it is also unconstitutional as an attempt to enter into a field of exclusive federal control--the regulation of foreign commerce. As previously pointed out, Congress' power in this area is exclusive and plenary (Japan Lines, Ltd. v. County of Los Angeles, supra, 441 U.S. 434; Zschernig v. Miller, 398 U.S. 429; Board of Trustees of University of Illinois v. United States, 289 U.S. 48). There is no room for states to move in this field without interfering with Congress' power.

Section 225, on its face, is an attempt to influence foreign commerce. It grants an exemption from taxation to imported goods if foreign businesses use California ports. It does not give such exemption to inter or intra state goods. It represents a direct attempt by the State of California to regulate foreign commerce by offering incentives to come into this state as opposed to other states of the Union. A detailed analysis of the effect Section 225 has on foreign commerce vis a vis federal tariff regulation is contained in Respondents' Brief in the pending case of Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577. Rather than repeat such arguments herein, Respondents merely will adopt them in support of their position in this case.

Respondents contend the foregin commerce clause is exclusive and plenary and does not allow any state action in the field. If Congress' power does not completely preempt the field, then the standard of review of state statutes impinging on foreign commerce must be the same as set forth in Complete Auto Transit v. Brady, 430 U.S. 274. And if such is the standard, then Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434 was wrongly decided.

Respondents have attempted to refrain from duplicating the positions and arguments set forth in their Respondents' Brief in Sears, Roebuck v. County of Los Angeles, October Term, 1978, No. 78-1577. However, such arguments apply with equal force to this case and Respondents incorporate them into their positions set forth herein.

II

NO ISSUE OF STANDING IS PRESENTED BY THIS APPEAL

A. ARTICLE III JURISDICTION-STANDING REQUIREMENTS

During oral argument in Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577, the issue of the County's standing to challenge the constitutionality of §225 was raised. The County contends that traditional standing requirements are not applicable to it in its status as Defendant/Respondent.

Current Article III standing requirements have been enunciated by the Court in a line of cases beginning with Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962) and Flast v. Cohen, 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968).

> "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf'. Baker vs. Carr 369 U.S. 186, 204, 82 S.Ct.

691, 703, 7 L.Ed.2d 663 (1962)." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). [Emphasis original]

Standing is shown when the complainant alleges an injury in fact and that such injury was the consequence of the defendant's action, or that prospective relief will remove the harm. Warth v. Seldin, supra, 422 U.S. 490, 505; Data Processing v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 164, 90 S. Ct. 159, 163, 25 L.Ed.2d 192 (1970).

In refining this relationship a plaintiff must have to the defendant's action, this Court has developed a "zone of interest" approach.

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) [Emphasis added]

In determining standing, it is not enough to simply show injury in fact. The plaintiff must also show he was protected by some statute

or Constitutional guarantee against this injury occuring.

This appeal satisfies all of the Article III standing requirements:

1. Petitioner has suffered an injury in fact - a tax was levied on its inventory, taxes were paid, and no refund of such tax has been made.

2. Petitioner's injury was directly caused by Respondent's action- the denial of the exemption provided by §225 and the refusal to refund the taxes.

3. Petitioner is within the zone of interests §225 attempts to protect.

4. A decision on the merits in this case will remove the harm - the Court will decide the County's action in denying the exemption provided by §225 was lawful in that the statute is unconstitutional.

In this case, both parties have sufficiently "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 205, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Petitioner has a real and concrete interest in obtaining a refund of the taxes it has already paid. Respondent has an equally real and adverse interest in that pending lawsuits involving the issue presented herein seek to recover well in excess of $1,000,000.00 (Appendix A. p. 56).

B. TRADITIONAL ARTICLE III STANDING REQUIREMENTS DO NOT APPLY TO DEFENDANTS/RESPONDENTS

The cases cited by Petitioner for the proposition that the County cannot challenge the constitutionality of §225 are inapplicable to this appeal and are readily distinguishable.

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L. Ed. 1015 (1933) involved a situation where the Mayor and City Council of Baltimore, and the Mayor, Counselor, and Aldermen of the City of Annapolis, municipal corporations, challenged the validity of a statute of Maryland exempting the property of a particular railroad from taxation. The railroad was in the hands of a receiver appointed by the Federal District Court. The municipal corporations brought suit in the Federal District Court against the receiver for taxes overdue.

On certiorari, this Court held the municipal corporations did not have the capacity to sue the State on Fourteenth Amendment grounds because:

> "A municipal corporation, created by a State for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." Williams v. Mayor and City Council of Baltimore, supra, 289 U.S. 36, 40. [Emphasis added]

The distinctions between that case and ours are obvious. Williams involved cities bringing suit as cities directly in Federal Court. Our case involves a County defending its action in State Court. The Williams plaintiffs (cities) had to meet federal jurisdictional requirements and were unable to do so. Respondents, being sued in State Courts, had no such obligation (nor did Petitioner below).

This Court decided Williams under the "privileges or immunities" clause of § 1 of the Fourteenth Amendment. Respondents query whether the result would be different under the due process or equal protection clauses in light of recent decisions of this Court. (Monell v. New York City Department of Social Services, 426 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Owen v. City of Independence, Missouri, ___ U.S. ___, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980).

Finally, the Court concluded Williams by noting that municipalities "will be heard to complain of a violation of the Constitution of the State. Their standing for that purpose, at least in the State Courts, is a question of State practice [citing cases] as to which the federal courts do not exercise an independent judgment." Williams, supra at 47, 48 [emphasis added]. The County had the statutory authority to sue and be sued in state court, and as the State did not limit this authority by prohibiting the County from raising the validity of a state statute as a defense to an action, no standing problem existed in tate ourt.

In City of New York v. Richardson, 473 F.2d 923 (1973) the City of New York and three individuals brought suit in the federal courts under the Fourteenth Amendment in an attack on federal and state social securities laws. The municipalities were dismissed out of the action based upon the Williams holding. Thus, Respondents' arguments to Williams apply to the City of New York case. But, again, it must be pointed out that the City of New York was a plaintiff trying to satisfy federal jurisdictional requirements in federal court. Neither of these cases require a defendant in state court to satisfy federal standing requirements.

When viewed against the backdrop of the case at bar, it becomes apparent that neither Williams nor City of New York precludes Respondents from raising the constitutionality of §225 in this appeal. The taxing agent for

Respondents is the Assessor. The Assessor has taken an oath to uphold the State and Federal Constitutions. He denied Petitioner's claim for exemption from taxation based on his belief that §225 violated provisions of both Constitutions. The Board of Supervisors of the County denied Petitioner's claim for refund of taxes. Unquestionably, the Assessor and the members of the Board of Supervisors would have standing before this Court to defend their actions (Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); City of New York v. Richardson, 473 F.2d 923, 933 (1973)). Unfortunately, they cannot be here; the County must stand in their place. California law requires that all litigation to recover taxes be brought against the public entities and not against the Assessor or members of the Board of Supervisors. (Revenue and Taxation Code §5140). Thus, the fact that the County of Los Angeles is the Respondent and not the Assessor is a State procedural matter and as long as federal question jurisdiction exists, this Court may decide the case.

Prudential reasons why this Court should exercise it jurisdiction are discussed infra. Respondents contend Article III jurisdiction exists, by virtue of Petitioner's standing to invoke it. Defendant standing has been the only issue raised by Petitioner. However, the remaining aspects of case or controversy jurisdiction are also satisfied by this appeal; to wit, this is not a collusive suit since Respondents have a $1,000,000 interest at stake, no political question is involved, and real adversorial

interests are present in that this case is not moot, hypothetical or speculative.

Whether a County should be allowed to raise the constitutionality of a State statute in defending an action may well be an issue of interest of this Court. However, it is an aspect of this Court's self-imposed policy on judicial restraint and not a constitutional requirement of Article III jurisdiction.

C. PRUDENTIAL CONCERNS DICTATE THIS CASE BE DECIDED ON ITS MERITS

Since Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), this Court has further refined its concept of "judicial restraint" or "prudential standing." Respondents are of the opinion the questions asked during oral argument in Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577 reflect a concern by some of the justices over this issue and not over pure Article III standing problems.

Prudential limitations on the exercise of federal court jurisdiction have historically revolved around the status of the plaintiff. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the courts remedial powers."

Warth v. Seldin, supra, 422 U.S. 490, 518. This is so because "without such limitations - closely related to Article III concerns but essentially matters of judicial self-governance - the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Id. at 500.

While Respondents contend these principles apply only to litigants seeking to invoke the Court's jurisdiction, if they are to be applied to a defendant, compelling reasons require a finding of prudential standing in the case. Governmental entities must be allowed to raise the unconstitutionality of a state statute as a defense to litigation brought against the entity based upon its failure to obey the statute.

Recently this Court held that municipalities are to be held strictly liable when its actions, through its officers, violate the constitutional rights of others (Owen v. City of Independence, Missouri, ___ U.S. ___, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980). No good faith defense was allowed in the §1983[1/] action on behalf of the governmental entity.

It takes no stretch of the imagination to foresee a Civil Rights action being filed against

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1/ 42 USC § 1983.

the County by taxpayers or a domestic or interstate businessman who alleges injury by the granting of exemptions under §225.[2/] Standing could be shown under Data Processing v. Camp, supra, 397 U.S. 150 (1979). Damages for loss of profits, refund of taxes, unfair competition, etc., would be sought, and attorneys' fees could be awarded (42 USC §1988). If §225 were declared unconstitutional, as Respondents contend, the County would be automatically liable for an untold amount of damages under the Owen v. City of Independence ruling.

By allowing the County to argue against the validity of §225 in this action, the Court would be encouraging public entities to protect the constitutional rights of its citizens while at the same time allowing them to avoid otherwise automatic and potentially crippling damage awards.

A separate reason for this Court to find that prudential standing exists is that the County of Los Angeles has express statutory authority to institute and defend litigation. Government Code §23004 grants to the County the power to sue and be sued. No reservation of litigation against the State is mentioned. While a state cannot confer Article III jurisdiction upon this Court, specific statutory authority to sue is

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2/ City of New York v. Richardson, 473 F.2d 923, 933 Fn. 11 (1973); Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

persuasive when considering the "prudential standing" issue [Warth v. Seldin, supra, 422 U.S. 490, 509; United States v. Richardson, 418 U.S. 166, 190, 94 S.Ct. 2490, 41 L.Ed. 678 (1974)].

Contrary to other cases in which prudential restraint was necessary and in which standing was found lacking, this case demands judicial resolution. The suit arose from the Assessor denying an exemption to Petitioner and many others similarly situated. This suit for refund of taxes was instituted and the County (ne Assessor) defended its action by challenging the validity of §225. In the meantime, the State legislature exempted all inventory from taxation which had the effect of repealing §225 (Calif. stats. 1979 ch. 1150, §7). Caught in limbo, however, are the hundreds of lawsuits involving the denial of the exemption and the resultant taxation of property prior to this new enactment. The legislature cannot enact legislation to require the Assessor to refund the taxes because the California Courts have declared §225 unconstitutional and the California Constitution would prohibit such legislation as a gift of public funds (Article 16, §6). Thus, the matter must be resolved by the Court, no other governmental body has authority to do so.

D. SUMMARY

In all cases involving federal court jurisdiction, the threshhold question to be answered is

whether the injury or personal stake involved in the case is sufficient to guarantee that concrete adverseness necessary under the case or controversy requirements of Article III of the Constitution. A reviewing court must address this concern prior to discussing the merits of the case.

This appeal does not present a case or controversy issue under Article III. Nor is this case an appropriate one for the court to exercise its judicial restraint powers. It is a proper case to be decided on its merits.

The merits of this case requires an answer to the question: is §225 of the Revenue and Taxation Code unconstitutional? Resolution of this issue is necessary to preclude further litigation on this matter and to allow the state and county to begin application of the new law.

The issue raised by Petitioner is not truely a one of standing under Article III. It is an offshoot of this Court's judicial restraint policy. As pointed out supra, it is not only prudentially wise to allow a county to test the validity of a state statute, it is absolutely necessary under the current state of the law. Absent this ability, litigation will have a devastating effect on local governments.

Respondents urge this court to favorably resolve the "standing" issue and reach the merits of this appeal.

CONCLUSION

The California Court of Appeal, in following the decision in Zee Toys, Inc. v. County of Los Angeles, supra, 85 Cal.App.3d 763, correctly anticipated this Court's decision in Hughes v. Oklahoma, supra, 441 U.S. 322 and looked at the discrimination present in Section 225 as it affected interstate and foreign commerce. The holding that the granting of an exemption to foreign goods which is withheld from interstate goods violates the Commerce Clause is correct.

Respondents submit that for the reasons stated herein as well as in the companion case of Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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